

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,145

JUPITER ASSOCIATES, INC.,
Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

RADIO ELIZABETH, INC.,
Intervenor.

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

APPENDIX OF THE PARTIES

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1969

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(i)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

JUPITER ASSOCIATES, INC.,
Matawan, New Jersey

Docket No. 14755
File No. BP-14178

Requests: 1530kcs, 500w, DA,
Day, Class II

William S. Halpern and Louis N.
Seltzer d/b as SOMERSET COUNTY
BROADCASTING COMPANY
Somerville, New Jersey

Docket No. 14756
File No. BP-14234

Requests: 1530kc, 1kw, DA,
Day, Class II

RADIO ELIZABETH, INC.
Elizabeth, New Jersey

Docket No. 14757
File No. BP-14812

Requests: 1530kc, 500w, Day,
Class II

For Construction Permits

ORDER

At a session of the Federal Communications Commission held
at its offices in Washington, D. C. on the 5th day of September, 1962;

The Commission having under consideration the above-caption-
ed and described applications;

IT APPEARING, That, except as indicated by the issues speci-
fied below, each of the instant applicants is legally, technically, fi-
nancially, and otherwise qualified to construct and operate the
instant proposals; and

IT FURTHER APPEARING, That the following matters are to be
considered in connection with the aforementioned issues specified
below:

1. The instant proposals appear to involve mutually
prohibitive interference.

2. BP-14178 and BP-14812 will cause interference to the existing operation of Station WFYI, Mineola, New York.
3. From the data submitted by Somerset County Broadcasting Company (BP-14234), it cannot be concluded whether adequate cash or liquid assets are available to finance construction costs and operation for a reasonable time under prevailing Commission criteria; the applicant shows an estimated cost of \$60,170 and a bank loan in the amount of \$60,000 from

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the Broad Street Trust Company, Philadelphia, Pennsylvania, to meet the cost of construction. No indication is made whether equipment is to be purchased on deferred credit, and it must be assumed that the costs of construction and initial expenses will be met with cash. Thus, the \$60,000 is inadequate to meet the constructions costs (\$60,170), and working capital for a reasonable period of time. Since the bank has made other loans to the co-partners in connection with other broadcasting operations and proposals, there is also a question as to whether the loan commitment dating from June 15, 1960, is still valid.

IT FURTHER APPEARING, That, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

IT IS ORDFRED, That pursuant to Section 309(a) of the Communications Act of 1934, as amended, the instant applications are DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from each of

the proposals and the availability of other primary service to such areas and populations.

2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and the interference that each of the instant proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether BP-14178 or BP-14812 would cause objectionable interference to Station WFYI or any other existing standard broadcast station, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

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4. To determine whether Somerset County Broadcasting Company is financially qualified to construct and operate its proposed station.
5. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service.
6. To determine, in the light of evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

IT IS FURTHER ORDERED, That VIP Broadcasting Corporation, licensee of Station WFYI, IS MADE A PARTY to the proceeding.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of either Jupiter Associates, Inc., or Radio Elizabeth, Inc., the construction permit shall contain a condition that the per-

mittees shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation, licensee of WFYI, for increased power as requested in BP-14328.

IT IS FURTHER ORDERED, That, in the event of the grant of any of the applications, the construction permit shall contain a condition that the permittee shall accept any interference received in the event of a subsequent grant of the proposal of Continental Broadcasting Company, requesting 1530kc, 1kw, DA-D, Hamden, Connecticut (BP-14811).

IT IS FURTHER ORDERED, That in the event of a grant of any of these applications, the construction permit shall also contain the following condition:

Pending a final decision in Docket 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

IT IS FURTHER ORDERED, That, in the event of a grant of either Jupiter Associates or Somerset County, there will be a need for compliance with Federal Aviation Agency regulations with respect to antenna structures (such approval was obtained by Radio Elizabeth).

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and party respondent herein, pursuant to Section 1.140 of the Commission Rules, in person or by attorney, shall within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

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IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, either individually or, if feasible, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.362(g) of the Rules.

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Released: September 11, 1962

[802]

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE
Preliminary Statement

1. This proceeding involves the applications of Jupiter Associates, Inc. (Jupiter); William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company (Somerset County); and Radio Elizabeth, Inc. (Radio Elizabeth), wherein all three applicants

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seek construction permits for new Class II Standard Broadcast Stations to operate daytime only on the frequency 1530 kilocycles, Jupiter proposes to operate at Matawan, New Jersey, with power of 500 watts, using directional antenna. The proposal of Somerset County is to operate at Somerville, New Jersey, with power of 1 kilowatt, using directional antenna. Radio Elizabeth proposes to operate at Elizabeth, New Jersey, with power of 500 watts.

2. As the applications are mutually exclusive and only one may be granted, the Commission designated them for consolidated hearing upon the following issues by order released September 11, 1962:

1. To determine the areas and populations which would receive primary service from each of the proposals ~~and~~ the availability of other primary service to such areas and populations.
2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and the interference that each of the instant proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether BP-14178 or BP-14812 would cause objectionable interference to Station WFYI or any other existing standard broadcast station, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
4. To determine whether Somerset County Broadcasting Company is financially qualified to construct and operate its proposed station.
5. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended,

which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service.

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6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

The Commission also named VIP Broadcasting Corporation^I, the licensee of Standard Broadcast Station WFYI, Mineola, Long Island New York, a party to the proceeding.

* * *

4. Prehearing conferences were held on October 8, 1962 and February 1, 1963. The evidentiary hearing was held on May 6, 7, 8, 9, 14 and 15, 1963; July 2, 15, and 22, 1963; and, October 2 and 18, 1963. The record was closed on the latter date. Proposed findings of fact and conclusions of law were filed November 5, 1963

^INow Media Enterprises, Inc.

[Footnote 2 omitted.]

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by Jupiter, Somerset County, Radio Elizabeth, Interstate, and the Commission's Broadcast Bureau. Replies were filed by Jupiter and Interstate on November 22, 1963, and by Somerset County and Radio Elizabeth, November 26, 1963.

Findings of Fact

5. Three applicants here are seeking construction permits for new Class II, standard broadcast stations to operate daytime only on the frequency of 1530 kilocycles. These applications are all mutu-

ally exclusive. Jupiter seeks to operate at Matawan, New Jersey, with power of 500 watts, using a directional antenna; while the proposal of Somerset County is to operate at Somerville, New Jersey, with power of 1 kilowatt, using a directional antenna. The third applicant seeks to operate at Elizabeth, New Jersey, with power of 500 watts.

6. Borough of Matawan, New Jersey: The site of the proposed Jupiter Station is the Borough of Matawan, New Jersey. Matawan Township is contiguous to Matawan Borough on three sides.³ Matawan Borough has a population of 5,097 persons.⁴ Matawan is approximately 4.2 miles from the nearest city limit of New York City, of which approximately three miles are over water. Matawan has an area of approximately 2.5 square miles. Matawan Township has a population of 7,359 persons and a horseshoe shaped area of approximately 7.5 square miles. Immediately contiguous to Matawan Township on the northeast lies Keyport Borough, with a population of 6,440. Matawan, Matawan Township and Keyport Borough area all situated in the northwest portion of Monmouth County, which has a population of 334,401 persons. The county seat of Monmouth County is the Borough of

³ All references to Matawan herein are to the Borough, as some of the witnesses on behalf of Jupiter interchangeably referred to Matawan both as a Borough and as a Township.

⁴ All population data herein are from the 1960 United States Census of population.

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Freehold, which lies about 11 miles south of Matawan Borough in Matawan Township.

7. There are 158 business establishments located in Matawan Borough, consisting largely of retail and service organizations.

The record does not disclose any substantial amount of manufacturing in Matawan, and Monmouth County is described as being predominately rural in character. The Census of Business reflects that Monmouth County has a total of 3,926 establishments, with total sales of \$403,671,000.00 in 1958 and at that time there were 293 wholesale trade establishments, having a total sales of \$122,713,000.00

8. Matawan is governed by a council form of government and has a local court handling traffic and other minor offenses; a Police Department, five volunteer fire departments, planning board, recreation commission, a public health association, a first aid squad and a public library. The Police Department consists of a Chief, Captain, and four full-time police, in addition to approximately 25 special part-time police for emergencies. The Matawan Free Public Library is supported by both Matawan and Matawan Township. The main library is in Matawan and has 10,000 volumes. There is a branch in Matawan Township which has 2,000 volumes. The Matawan Borough Council supervises the activities of the various boards and departments and also acts upon applications for building permits.

9. The major highways serving Matawan and Matawan Township are New Jersey Routes 18, 34, 79 and the Garden State Parkway. Public transportation service available to and from Matawan includes several daily Pennsylvania Railroad passenger runs to New York and Newark. There are no regular buses from Matawan to New York but there are several daily bus runs from nearby Keyport to Newark and New York.

10. There are only two churches in Matawan but there are several churches of various denominations in nearby Keyport and Holmdel Township. There is no Chamber of Commerce in Matawan. The two leading civic organizations are the Rotary Club and the Matawan

Women's Club. In 1961 Matawan Borough and Matawan Township combined their public educational facilities into a common board, the Matawan Regional School Board. There are 3,300 pupils in the combined school system. Four members of the board are elected by the Borough and five by the Township. There are two commercial banks and one savings and loan association located in Matawan.

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11. There is no standard broadcast station, and likewise neither an FM Station nor a television station is situated in Matawan. The Matawan Journal is the local weekly newspaper. Both the Matawan Journal and the Keyport Weekly are published in Keyport by the Brown Publishing Company.

12. Telephone service is provided to Matawan by the Bell Telephone System, which is located in nearby Keyport. Electric service is furnished by the Jersey Central Power and Light Company. Natural gas is supplied by the New Jersey Natural Gas Company to certain areas around Matawan.

13. Matawan has a first class Post Office, which also serves Matawan Township. The Post Office has a Postmaster, Assistant Postmaster and 21 employees assigned to it. Its revenue is in excess of \$150,000.00 annually, having increased more than 30 percent in the last five years. The Matawan Post Office is responsible for the delivery of mail on five residential routes, with more than 2,000 families; and, one rural route, that serves more than 600 families. There are a total of 222 postal boxes installed in the Matawan Post Office. The Postmaster of Matawan testified that he had received approval from the postal authorities for additional postal boxes, which will bring the total capacity to approximately 400.

2d

14. Somerville, New Jersey: Somerville, New Jersey, is the governmental seat of Somerset County, and the Borough of Somerville. It has a population of 12,458 persons and lies in the New York-Northeastern New Jersey Urbanized Area. In 1782 the town of Somerville became the County Seat of Somerset County. Around the turn of the century, the development of water, rail and highway transportation made Somerville the center of a growing industrial area, and in 1909 the town of Somerville was established as an independent municipality. It is located on the urbanized area's western limits about 18 miles west of New York's closest city limit, and about 19 miles west-southwest of the closest city limit of Elizabeth, New Jersey. The population of Somerset County is 143,913.

15. According to the 1958 United States Census of Manufacturers the community had 263 retail establishments with gross annual sales of almost 36.5 million dollars. At that time there were 26 wholesale trade establishments with 14 million dollars gross annual sales, and 11 manufacturing establishments that employed 411 people. Also under the listing of Selective Services, there were 122 establishments with total receipts of slightly over three and one quarter million dollars, with a payroll in excess of one million dollars. Additionally, adjacent to Somerville are

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several plants with more than 1,000 employees each which utilize Somerville as a trading center. The manufacturing payroll is \$1,-657,000.00.

16. The Somerset Hospital located in Somerville has 213 beds and 40 bassinets. It currently has a fund drive campaign underway in an effort to raise additional funds to expand its capacity to 300

beds. The hospital has a teaching program, which includes an interns' and residents' program, and a nursing school with capacity of 75 students. In addition to the 500-member Women's Auxiliary Boards, the hospital also has 750 men, women and teen-age volunteers who work two to four hour shifts each week at the hospital.

17. There are four banking institutions operating in Somerville. Somerville schools include one high school, one junior high school, four elementary schools, one parochial school and three nursing schools. In addition to the Somerset County Welfare Board there are eight other health and welfare agencies in Somerville. Other county major health and welfare facilities headquartered in Somerville are the Somerset Cerebral Palsy Treatment Center which opened in 1951 and currently cares for 117 children, providing physical and speech therapy and other specialized instructions; the Immaculate Conception Speech Correction Center, offering courses for both children and adults afflicted with stuttering, sound or articulatory trouble; the Somerset County Blind Association, which provides a recreation program for the blind; and the Somerset County Guidance Center, a clinic which supplies Somerset County residents with diagnostic and consultation services for emotional disturbances, neuro-psychiatric and psychological problems.

18. Somerville has no AM, FM or TV transmittal facilities. There is no daily newspaper, but there are two weekly newspapers; namely, The Somerset Messenger Gasette and The South Somerville News which are published in Somerville.

19. There are 16 churches in Somerville of various religious denominations. There are more than 85 civic organizations and community service agencies in Somerville. Prominently included among these are national organizations, such as Kiwanis, Rotary, and Lions Clubs. There are also chapters of national fraternal or-

ganizations and veterans' groups. Certain groups are devoted to specific details of the community's welfare. These include such organizations as the Parent-Teacher Associations affiliated with each school, the volunteer fire companies, the rescue squads, groups concerned with the hospital

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and other matters pertaining to the area's health services, as well as numerous local and neighborhood civic organizations. Most of the national professional societies are represented in the Somerville area. In addition, many of the area's industries sponsor clubs for their employees.

20. Somerville is located at the intersection of major East-West and North-South Highways, and Routes 22, 202, and 206 provide ready accessibility to New York, Philadelphia and northern Pennsylvania, with New York City approximately one hour from Somerville by automobile, bus or train. The completion of Interstate Highways 78 and 287 will link the area directly with all other major turnpikes. The Central Railroad of New Jersey provides Somerville area residents with commuter and freight service to Jersey City and New York City to the east and Easton, Pennsylvania, to the west. The Philadelphia and Reading and the Lehigh Valley Railroads offer commuter and freight service to New York and Pennsylvania. In addition, there are several bus lines operating out of Somerville to New York, Pennsylvania, and nearby communities. Situated nearby in Hillsborough is the Manville Airport.

21. The Somerset County Library, organized in 1930, was housed in the Court House Annex in Somerville until 1952 when it was moved to the County Administration Building. This library serves the people of Somerset County through eight local libraries,

19 library stations and 26 direct service stops of three mobiles. Library service is also maintained to all Somerville area public and private schools.

31
LOCATION
22. City of Elizabeth, New Jersey: The history of Elizabeth dates back to 1664 when the land comprising more than the present area of Elizabeth and Eastern Union County was purchased from Indians by early settlers. Sir George Carteret founded the town of Elizabeth which was made capital of the Province of New Jersey in 1668. Since that time Elizabeth has had a substantial growth.

23. Elizabeth, New Jersey, has a population of 107,698. It is the county seat of Union County, which has a population of 504,255 persons. Elizabeth is part of the New York-Northeastern New Jersey Urbanized Area. It is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island Sound) and Newark Bay. Elizabeth is connected to Staten Island by the Goethals Bridge. Elizabeth is adjacent to Newark, but Newark is in Essex County. The eastern most border of Elizabeth consists primarily of Newark Airport, industrial areas, and large areas undeveloped,

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which it is contended will be industrial areas. The Newark Airport therefore serves Elizabeth and has connections with 12 major airlines. The towns of Roselle Park, Roselle, Hillside, Linden and Union, to the west and north, bear a degree of similarity to Elizabeth. However, these towns are more residential in nature than is Elizabeth proper. There was some contention at the hearing that Elizabeth and Newark are the one and same community, but the record is replete with evidence that such is not the case. Therefore, essentially, they must be regarded as two separate cities because of their respective make-ups.

24. Elizabeth is a seaport. It has its own cultural, social, civic and charitable organizations. Elizabeth is the 130th largest city in the United States. It ranks 138th in net effective buying income and ranks 155th in total retail sales. NB

25. It is contended by this applicant that the records of the Commission reflect that only two cities in the United States and Puerto Rico having populations larger than that of Elizabeth do not have standard broadcast stations. In addition to not having a standard broadcast station, Elizabeth does not have an FM Station or a television facility. NB pt

26. Elizabeth and Union County provide access to the New Jersey Turnpike, New Jersey Garden State Parkway, the Goethals Bridge, the Holland and Lincoln Tunnels and the George Washington Bridge. United States Highways 1 and 22 traverse the city and county. The general area is served by the Pennsylvania, Jersey Central, Reading, Long Branch, Lehigh Valley and Rahway Valley Railroads. Likewise, service is rendered by 18 bus lines and 12 motor freightways.

27. In 1960 the city began operation under a completely revised municipal charter and is presently governed by the mayor form of government. The city government contains numerous departments, agencies, boards and special organizations.⁵

⁵The city's governmental units include: Administration, Law, Finance, Public Works, Health Welfare and Housing, Police, Fire, Recreation, City Planning Board, Board of Adjustment, Board of Standards and Appeals, Municipal Court, Alcoholic Beverage Control, Board of Electrical Examiners, Industrial Commission, Examiners of Plumbers, Redevelopment Agency, Parking Authority, Insurance Fund Commission, Housing Authority, Trustees of Library, Board of Education, Board of School Estimate, Local Assistance Board, Human Relations Commission, and Civil Defense Council.

28. There are nine major banks in Elizabeth, which include three savings banks, two savings and loan associations and four commercial banks with total assets of 430 million dollars. Elizabeth is heavily industrialized and commercialized. The principal industries are four in number: sewing machines, pharmaceutical products, automotive, gas and chemicals, which employ approximately 32,000 out of a total 137,837 employees in Elizabeth alone. There are numerous small manufacturers and processors located in Elizabeth. The port of Elizabeth has just been completed. It was a 250 million dollar project, and reflects the vast trading area of Elizabeth and its environs. There are six retail centers in the city and many other neighborhood stores. The city has several multi-story structures. Elizabeth maintains its own urban development program, as well as having an industrial commission, which assists new industry to find suitable and profitable locations and homes in the city.

29. There are three major hospitals in Elizabeth with a total capacity of 918 beds. In the public school system of Elizabeth, there are three senior high schools, five junior high schools and 19 elementary schools. In addition to the public school system, there are three parochial senior high schools, 15 parochial elementary schools, one Jewish senior high school, one Jewish junior high school and one Jewish elementary school, one private boys' school and a private school for girls. *now*

30. The Elizabeth Police Department has 240 policemen, 11 civilian administrators and 59 school crossing guards; while the Fire Department consists of 14 fire companies, approximately 30 pieces of equipment and 273 firemen.

31. In Elizabeth there is only one newspaper, the Elizabeth Daily Journal. This paper is sold mostly in eastern Union County

to approximately 55,000 subscribers. The Newark Evening News has a Union County edition that reaches into Newark but the record is void as to the number of subscribers in Elizabeth.

32. There are a total of 62 churches in Elizabeth representing many denominations. There are more than 30 organizations, civic and charitable, in the city, including such organizations as the American Cancer Society, Red Cross, YMCA, YWCA, YMHA, Lions Club, Soroptimist Club, Knights of Columbus, Elks, and Masonic Order.

33. The Jupiter Proposal: Jupiter used Figure M-3 ground conductivity values and radiation values from the proposed directional antenna patten to determine its coverage. On this basis, its proposed

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coverage would be:

<u>Contour</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
2.0 mv/m	474,000	221
0.5 mv/m	531,681	673
Interference from WFYI*	33,657 (6.3%)	63
Interference-free	498,024	610

*Percentage refers to the normally protected contour population.

34. Nine stations provide 0.5 mv/m (or better) primary service to all of the proposal's rural area and two other stations would serve large portions of that area. None of the aforementioned rural area receives service from less than 10 stations. 10 stations provide 2.0 mv/m primary daytime service to Matawan.

35. Jupiter's proposal would cause objectionable adjacent channel interference to Station WFYI, Mineola, New York. The interference area is located 27 to 47 miles southwest of Station WFYI along

New Jersey's eastern shore; it is near Asbury Park and about 7 to 15 miles east and southeast of the proposed site. The interference would occur over 74 square miles and include 13,659 people. Such interference represents 8.5 percent of WFYI's normally protected area (872 sq. mi.), but only 0.47 percent of its normally protected 2,937,000 population. Nine stations provide 0.5 mv/m primary service to all the interference area, and ten stations provide such service to any portion of that area.

36. Jupiter's proposal would not cause objectionable interference to any other existing standard broadcast station.

2d proposal
37. Somerset County's Proposal: Somerset County used Figure M-3 ground conductivity values and radiation values from the proposed directional antenna patterns to determine its proposed coverage. On this basis, such coverage would be:

<u>Contour</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
2.0 mv/m	212,126	311
0.5 mv/m (normally protected)*	307,686	1,085

*The normally protected contour is interference-free.

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NB
38. Eight stations provide 0.5 mv/m (or better) primary service to all of the proposal's rural area and 33 stations serve portions of such area. None of this rural area receives less than 16 or more than 27 services. All of Somerset County's proposed urban areas receive 2 mv/m primary service from six stations and part of such areas receive such service from six other stations. There are from six to twelve primary services available to all of Somerville and one other station serves 50 percent of the city.

3d proposal

39. The Proposal of Radio Elizabeth Radio Elizabeth used Figure M-3 ground conductivity values⁶ and an effective field of 124 mv/m to determine its coverage. On this basis, its proposed coverage would be:

<u>Contour</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
2.0 mv/m	1,402,312	249
0.5 mv/m	1,492,830	822
Interference from WFYI*	4,056 (0.27%)	36
Interference-free	1,488,774 ⁷	786

*Percentage refers to population within the normally-protected contour.

40. Ten stations provide 0.5 mv/m (or better) primary service to Elizabeth and to all of the urban and rural areas within the proposed primary service area. The proposed 2 mv/m contour would encompass only urban areas all of which lie within the New York-New Jersey Urbanized Area and contains 9.9 percent of the population within that area.

41. Radio Elizabeth's proposal would cause objectionable adjacent channel interference to Station WFYI, Mineola, New York. The interference area falls 26.5 to 34.5 miles southwest of Station WFYI on New Jersey's eastern shore and 16.5 to 21.5 miles southeast of the proposed site. 8,901 people over 26 square miles would receive that interference. This represents 3 percent of WFYI's normally protected 0.5 mv/m area, but only 0.3 percent of its normally-protected population of 2,937,000 people. At least 10

⁶Test measurements taken from the proposed transmitter site for limited distances were not used to establish station coverage (other than for the proposed 25 mv/m contour) since their use would not materially affect the location of such contours.

⁷Radio Elizabeth's proposed 2 mv/m contour embraces many communities in the urbanized area including approximately three-fourths of Newark, a city of 405,220 persons.

stations provide primary service to the interference area.

42. Outside of WFYI, Radio Elizabeth's proposal would not cause objectionable interference to any other existing standard broadcast station.

* * *

Conclusions

1. Three applicants are here seeking construction permits for new Class II standard broadcast stations to operate daytime only on the frequency of 1530 kilocycles. Because of the mutually destructive electrical interference only one of these applications can be granted.

2. Three northern New Jersey communities are involved. Jupiter Associates, Inc., seeks to operate at Matawan, with power of 500 watts, using a directional antenna; Somerset County Broadcasting Company requests authority to operate at Somerville with power of 1 kilowatt, using directional antenna; while Radio Elizabeth seeks to operate at Elizabeth, with power of 500 watts.

3. Before turning to Issue Number 5, which is the 307(b) Issue, Issues Numbers 3, 4, and the added issue must be resolved.

4. Issue Number 3: Issue Number 3 relates to whether the Jupiter or Radio Elizabeth proposals would cause objectionable interference to Station WFYI, Mineola, New York.¹⁶ The Jupiter and Radio Elizabeth proposals would cause slight adjacent channel objectionable interference to Station WFYI. As for Jupiter, the interference area is limited 27 to 47 miles southwest of Station WFYI, along the New Jersey eastern shore. It is near Asbury Park and

about 7 to 15 miles east and southeast of the proposed site at Matawan. This represents 8.5 percent of WFYI's normally protected 0.5 mv/m area, but only 0.47 of its normally protected population. Nine stations serve all of the interference area and at least ten stations serve any one portion thereof. pt

5. Radio Elizabeth's interference area falls 26.5 to 34.5 miles southwest of Station WFYI on the New Jersey eastern shore and 16.5 to 21.5 southeast of the proposed Elizabeth site. It would affect 8,901 people over an area of 26 square miles, which represents three percent of WFYI's normally protected 0.5 mv/m contour but only 0.3 percent of the normally protected population. At least ten stations serve this interference area. pt

¹⁶ Counsel for Station WFYI entered an appearance but did not participate in the evidentiary hearing.

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6. The proposals of Jupiter or Radio Elizabeth would cause no objectionable interference to any existing standard broadcast station, other than those just referred to above. *interfer. finding*

7. The conclusion is here reached that both the Jupiter and Radio Elizabeth proposals harmonize with the tenor of Section 3.24(b) of the Commission's Rules in that the need for the service to be provided by either of these proposals outweighs the need for the service which would be lost by the reason of such interference in their respective areas. And, more particularly is this true, as a grant of either proposal would bring a first local transmission outlet to the respective community.

* * *

20. The 307(b) Issue,¹⁹ The three proposals under consideration are mutually exclusive and none would provide primary service, 2 mv/m or better, to either of the other two communities. At the present time there is not a standard broadcast station in either of the three communities, and additionally, neither community has a local FM Station nor a local television facility.

21. The underlying determinants must be accorded consideration in resolving the 307(b) issue. They are: (1) the need for reception service, and (2) the need for transmission service.

22. Somerville and Elizabeth are a part of the New York-Northeastern New Jersey Urbanized Area and Matawan is in close proximity thereto. As all three proposals can be regarded as local in nature, it is clear that none of them would provide substantial coverage to the New York-Northeastern New Jersey Urbanized Area. The service areas proposed by each of the three applicants presently have numerous other services available, with a minimum of nine or ten at any given point. The communities of Matawan and Elizabeth currently receive primary service from at least ten other stations, while Somerville receives primary service from seven standard broadcast stations, with an eighth station providing primary service to 50 percent of that community. Most of the service in each case comes from radio stations located in New York or northern New Jersey. The result is that no preference can be accorded to either of the applicants on this point because of the abundance of reception service to the three communities.

¹⁹The substance of Section 307(b) of the Communications Act of 1934, as amended, is that the Commission shall make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

23. The controlling factor here resolves around each respective community's need for transmission service, as Matawan, Somerville and Elizabeth all have, as related above, substantial degrees of reception service. It is significant that Elizabeth, which is one of the largest cities in the United States, is conceivably the third largest city in the United States and Puerto Rico not having a standard broadcast station. While size cannot be construed necessarily as the dominant aspect, it certainly cannot be passed over lightly. The Borough of Matawan has a population of 5,097 persons, while the City of Somerville has 12,458. On the other hand, the City of Elizabeth reflects a population of 107,698 persons. By way of another comparison, Jupiter's proposal would render interference-free service on its 0.5 mv/m contour to 498,024, embracing an area of 610 square miles. The Somerset County proposal would provide service to its 0.5 mv/m normally protected contour of 307,686 persons in an area of 1,085 square miles. The proposal of Radio Elizabeth would provide service to its interference-free 0.5 mv/m contour with a population of 1,488,774 persons in an area of 786 square miles. Thus, it is discernible that it would bring a new service to a population that is nearly double the combined population contained in the Somerset and Jupiter proposals. JB

24. Both Somerville and Elizabeth are county seats of their respective counties. Somerville is located in Somerset County, which has a population of 143,913 persons; while the county in which Elizabeth is situated; namely, Union County, has over one-half million persons, or to be exact 504,255 persons. Matawan is located in Monmouth County where the population is 334,401 persons.

25. In addition to the foregoing, Elizabeth is a port city and the hub of greater business, industrial and manufacturing activities than are the other communities. That the new Elizabeth seaport was recently constructed at a cost of \$250,000,000.00 bespeaks of the city's importance as a business and trading center.

26. By way of further comparison, Elizabeth ranks in size as the 130th largest city in the United States, while its total retail sales rank 155. Neither Somerville nor Matawan are comparable to Elizabeth economic-wise. The record does not reflect any substantial amount of manufacturing in Matawan. There is considerable amount of manufacturing done in Somerville and its nearby environs, but the manufacturing in Somerville does not by any measure compare with that in Elizabeth. Four industries in Elizabeth alone employ nearly 32,000 persons, which is nearly twice the combined populations of both Matawan and Somerville. Matawan has no Chamber

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of Commerce and only two civic organizations; namely, the Rotary Club and the Matawan Women's Club. There are only two churches in the Borough of Matawan. On the other hand, both Somerville and Elizabeth have a large number of civic organizations and community service agencies. There are 62 churches in Elizabeth and 16 in Somerville. In Elizabeth there are four commercial banks, three savings banks and two savings and loan associations; while in Matawan there are two commercial banks and one savings and loan association. On the other hand, there are four banking institutions in Somerville. Elizabeth has substantially more public, parochial and private schools than the other two communities have, which reflects a much larger school population. To compare briefly certain public

services involved in the three communities, Matawan has a Police Department consisting of only six full-time policemen with approximately 25 special part-time policemen for emergencies; while Elizabeth has 240 policemen, with 11 civilian administrators and 59 school-crossing guards. It is obvious that Somerville would not have a Police Department comparable in size to Elizabeth. The Elizabeth Fire Department consists of 14 fire companies, which is comprised of 273 firemen with approximately 30 pieces of equipment. Matawan and Somerville have volunteer fire companies. Somerville has a hospital with 213 beds and 40 bassinets and currently has underway a campaign to expand the capacity to 300 beds. On the other hand, Elizabeth has three major hospitals with 918 beds. The record does not disclose whether or not there is a hospital in Matawan. There are other comparisons that may be made as to the respective communities which are not deemed necessary to be spelled out in this Initial Decision as they are overwhelmingly favorable to the City of Elizabeth.

27. It is therefore concluded that the grant of the Radio Elizabeth application would result in a more fair, efficient and equitable radio service in accordance with the provisions of Section 307(b).

28. In view of the foregoing findings of fact and conclusions of law, and upon consideration of the entire record in this proceeding it is concluded that a grant of the application of Radio Elizabeth, Inc., for a construction permit for a new Class II standard broadcast station to operate on 1530 kilocycles, with power of 500 watts, daytime only, at Elizabeth, New Jersey, would serve the public interest, convenience and necessity con-

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ditioned upon the following:²⁰

1. Permittee shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation [Media Enterprises, Inc.], license of WFYI, for increased power as requested in BP-14328.
2. Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

ACCORDINGLY, IT IS ORDERED, this 9th day of December 1963, that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Jupiter Associates, Inc., for a construction permit for a new standard broadcast station, to operate on 1530 kilocycles, 500 watts, day, Class II, utilizing a directional antenna, at Matawan, New Jersey, and the application of William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company, for a construction permit for a new standard broadcast station to operate on 1530 kilocycles, 1 kilowatt, day, Class II, employing a directional antenna, at Somerville, New Jersey, ARE DENIED; and, the application of Radio Elizabeth, Inc., for a construction permit for a new standard broadcast station to operate on 1530 kilocycles, 500 watts, day, Class II, at Elizabeth, New Jersey, IS GRANTED conditioned upon the following:

²⁰The Commission in its order of designation set out three conditions to be included in the event a grant of the application of Radio Elizabeth was proposed, but the third condition is now moot in view of the dismissal of the application of Continental Broadcasting Company (BP-14811) on January 31, 1963.

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1. Permittee shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation [Media Enterprises, Inc.], licensee of WFYI, for increased power as requested in BP-14328.
2. Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

/s/ Jay A. Kyle
Hearing Examiner
Federal Communications Commission

Released: December 10, 1963
and effective 50 days thereafter,
subject to the provisions of the
Rule (1.276) cited in the ordering
clause above. Exceptions, if any,
must be filed within 30 days of the
release date unless an extension is
duly granted.

1963
DECISION

1st Dec.

By the Review Board: Pincock and ~~Sloane~~. Board Member Nelson
concurring and issuing a statement.

1. This proceeding involves three mutually-exclusive applications for a new Class II standard broadcast station (1530 kc, Day) in New Jersey. Jupiter Associates, Inc. (Jupiter) would locate at Mat-awan (500 w, DA). William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company (Somerset) would locate at

Somerville (1 kw, DA). Radio Elizabeth, Inc. (Radio) would locate at Elizabeth (500 w, non-directional). The applications were designated for hearing by Commission Order (FCC 62-926, released September 11, 1962) on issues relating to areas and populations to gain service; interference each would cause and receive, and the availability of other services; interference by Jupiter and Radio to Station WFYI, Mineola, New York; Somerset's financial qualifications; and Section 307(b).¹ By Memorandum Opinion and Order (FCC 63R-36, released January 21, 1963),

¹The licensee of WFYI was named a party to the proceeding.

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the Review Board granted the request of Interstate Broadcasting Company, Inc. (WQXR) to intervene and on its own motion added an issue to determine whether there would be overlap of the 25 mv/m contours of Radio and WQXR's proposed change in directional antenna. In an Initial Decision (FCC 63D-140, released December 10, 1963) Hearing Examiner Jay A. Kyle proposed a grant of the Radio application for Elizabeth. Exceptions were filed by Jupiter, Somerset, WQXR, and the Broadcast Bureau, and Jupiter, Somerset and Radio filed reply briefs, Oral argument was held before a panel of the Review Board on October 13, 1964.

2. The Board has reviewed the Initial Decision in light of the exceptions and the arguments. With the modifications noted in this Decision and in the rulings on exceptions contained in the Appendix attached hereto, the Examiner's Findings of Fact are adopted. While the Board agrees with the result recommended by the Examiner, his conclusions require amplification. To put our conclusions in perspective, we will briefly review the pertinent facts.

3. Jupiter's proposed 0.5 mv/m contour encompasses 531,681 persons in a 673 square mile area; interference received² would affect 33,657 persons in a 63 square mile area; thus, Jupiter's proposed 0.5 mv/m interference-free contour would encompass 498,024 persons in a 610 square mile area. A minimum of 9 stations provide primary service to all of the rural area proposed to be served by Jupiter. Ten stations provide primary service to Matawan. Adjacent channel interference would be caused by Jupiter's proposal to Station WFYI (Class II, 1520 kc, 10 kw, DA-D) affecting 13,659 persons in a 74 square mile area (0.47% of the population and 8.5% of the area within Station WFYI's 0.5 mv/m normally protected contour.) The interference area is located 27 to 47 miles southwest of Station WFYI along New Jersey's eastern shore; it is near Asbury Park and about 7 to 15 miles east and southeast of the proposed site; and it receives service from 9 stations.

4. Somerset's proposed 0.5 mv/m contour encompasses 307,686 persons in a 1,085 square mile area; the normally protected contour is interference-free. Somerville receives service from seven stations and an eighth serves 50% of Somerville. A minimum of 6 stations provide primary service to all of the urban and rural areas proposed to be served by Somerset.

5. Radio's proposed 2.0 mv/m contour would cover urban areas all of which lie within the New York-Northeastern New Jersey Urbanized Area and contain 9.9% of the population within that area; it would serve communities in the urbanized area including approximately 92% of the

²The figure represents interference from WFYI.

population of Newark, a city of 405,220 persons. Radio's proposed 0.5 mv/m contour encompasses 1,492,830 persons in an 822 square mile area; interference³ would affect 4,056 persons in a 36 square mile area; thus, Radio's proposed 0.5 mv/m interference-free contour would encompass 1,488,774 persons in a 786 square mile area. A minimum of 10 stations provide primary service to all of the urban and rural areas proposed to be served by Radio. Adjacent channel interference would be caused by Radio's proposal to Station WFYI affecting 8,901 persons in a 26 square mile area (0.3% of the population and 3% of the area within WFYI's 0.5 mv/m normally protected contour). The interference area located 26.5 to 34.5 miles southwest of WFYI on New Jersey's eastern shore, and 16.5 to 21.5 miles southeast of the proposed site, receives service from 10 stations.

6. Matawan Borough had a 1960 U.S. Census population of 5,097 persons. Matawan Township had a population of 7,359 persons and is a horseshoe-shaped area contiguous to Matawan Borough on three sides. Matawan Borough is approximately 4.2 air miles from the nearest city limits of New York City, of which approximately three miles are over water. It has no standard, FM, or television broadcast station.

7. Immediately contiguous to Matawan Township on the northeast lies Keyport Borough, with a population of 6,440. Matawan Borough, Matawan Township, and Keyport are all situated in the northwest portion of Monmouth County, which has a population of 334,401 persons. The County seat of Monmouth is Freehold Borough, which lies about 11 miles south of Matawan Borough in Matawan Township. Matawan Borough has an area of approximately 2.5 square

³The figure represents interference from Station WFYI.

miles and Matawan Township has an area of approximately 7.5 square miles. Matawan Borough has a number of business establishments, churches, educational facilities, civic organizations and governmental units, usual to this size community.

8. Somerville had a 1960 U.S. Census population of 12,458 persons. It lies in the New York-Northeastern New Jersey Urbanized Area which had a population of 14,114,927; Somerset County, of which Somerville is the county seat, had a population of 143,913. Somerville is on the urbanized area's western limits about 18 miles west of New York's closest city limit and about 19 miles west-southwest of the closest city limit of Elizabeth. It has no standard, FM or TV broadcast station. It has a number of schools, churches, and business establishments, and numerous health, fraternal and social organizations.

9. Elizabeth had a 1960 U.S. Census population of 107,698 persons. Elizabeth is part of the New York-Northeastern New Jersey

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Urbanized Area; Union County, of which Elizabeth is the county seat, had a population of 504,255. Elizabeth is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island Sound) and Newark Bay. It has no standard, FM, or TV broadcast station.

10. Elizabeth is heavily industrialized and commercialized; the four principal industries are sewing machines, pharmaceutical products, automotive, and gas and chemicals. There are numerous small manufacturers and processors located in Elizabeth. The city has its own port which has just been completed. Elizabeth has a daily newspaper. It has numerous schools, churches, cultural and social

organizations, civic and charitable organizations, etc. It has a mayor form of government.

11. The Examiner concluded that both the Jupiter and Radio proposals would cause slight adjacent channel interference to the operation of Station WFYI (see paragraphs 3 and 5, supra) but that this was not sufficient to require denial of either application. With this we agree and we adopt the Examiner's findings and conclusions except as otherwise indicated in our rulings on exceptions.

12. The Examiner also concluded that there will be minimal overlap of the 25 mv/m contours of Radio's proposal and WQXR, but that the provisions of Section 73.37 of the Rules should be waived in favor of the applicant.

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25. In the Examiner's view, the 307(b) aspects of this case were determinative and the differences between the needs of the communities were so distinct that the choice was not difficult. Considering first the need for reception service, the Examiner concluded that no preference could be awarded, since the areas to be served by each of the proposals already received an abundance of reception services. In this we agree and adopt his findings and conclusions. Having concluded that no applicant could be preferred on the basis of relative need for reception service, the Examiner stated that the 307(b) choice must be governed by the relative need of each of the three communities for a first local transmission service. It was the Examiner's premise that each of the proposals must be considered "local in nature", i.e., for Elizabeth, Somerville, and Matawan. His ultimate conclusion was that Elizabeth was the clear 307(b) victor

based on its size and importance relative to each of the other communities, the comparison being "overwhelmingly favorable" to Elizabeth. The Bureau, which filed only minor corrective 307(b) exceptions, supports the Examiner's grant of Radio's application. Somerset's 307(b) exception relating to Radio rests on its contention that because of Radio's alleged failure to comply with Section 73.37 of the Rules, no 307(b) comparison should have been given this application. The most extensive and significant 307(b) exceptions with regard to Radio have been filed by Jupiter.

26. Jupiter contends that, for 307(b) purposes, Radio's proposal must be treated as a proposal for Newark. Its conclusion in this regard rests upon the fact that Radio's proposed operation would provide primary service to 92% of the population of Newark, and to 61.5% of the total population of the Newark, New Jersey, Standard Metropolitan Statistical Area as defined by the 1960 Census. A

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grant of Radio's application, Jupiter maintains, would have the effect of establishing "just another station in the vast New York City-Northeastern New Jersey complex." Jupiter also points out that Radio in proposing to operate with 500 watts of power, would operate with power in excess of the minimum for the class of station it seeks, namely, 250 watts. Jupiter also contends that the relationship of Elizabeth to Newark supports the conclusion that the "Radio Elizabeth community includes the city of Newark." Finally, Jupiter contends that the three standard broadcast stations in Newark have "studios which are readily available to the residents of Elizabeth," and that Elizabeth's need for a station is therefore less than the need of Matawan for a station.

27. The Commission has recognized that 307(b) considerations are not always determinative in making a choice between applicants which have specified different cities as their principal communities. Thus, in Huntington Broadcasting Co., 5 RR 721 (1950), one of the applicants specified Los Angeles as its principal community, and the other applicant specified adjoining Huntington Park as its principal community. Each of the proposed Class II operations would have served in excess of 80% of the population of the Los Angeles metropolitan district. Because of these circumstances, the Commission concluded that a choice between the two applicants could not be based upon 307(b) considerations, but that the choice must instead be based upon the relative merits of the two proposals as measured by the standard comparative criteria. Similarly, in Massillon Broadcasting Co., 36 FCC 809, 2 RR 2d 409, the Commission concluded that the standard comparative criteria, rather than 307(b) considerations, must govern in making a choice among applicants where the Class III proposals of each of them, though specifying suburban cities as their principal communities, would provide a 2.0 mv/m service to all or nearly all of Cincinnati.

28. The case before us is readily distinguishable from both Huntington Broadcasting and Massillon on the facts. While there is some overlap of primary service of the proposals before us,⁹ the service areas common to two or more of the applicants are small

⁹The populations which would be served by each of the proposals are as follows: Jupiter, 498,024, Somerset, 307,686, and Radio, 1,488,774. Jupiter's proposal would not serve the city of Elizabeth, nor would Radio's proposal serve Matawan. Jupiter's 2 mv/m contour would encompass approximately one-third of the area within Radio's 2 mv/m contour. Radio's 2 mv/m contour would embrace about one-third of Matawan's 2 mv/m area. Radio's proposal would

not serve Somerville, nor would Somerset's proposal serve Elizabeth. There would be no overlap between the 2 mv/m contours of Radio's and Somerset's proposals. The 0.5 mv/m contour of each proposal would overlap the 0.5 mv/m contour of each of the other proposals by a substantial amount.

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compared to the common service areas involved in both Massilon and Huntington Broadcasting. Jupiter's contention that Radio's proposal should be treated as one for Newark or for the larger New York Metropolitan complex also relies upon the Commission decisions in Radio Crawfordsville, Inc., 34 FCC 996, 25 RR 533, 35 FCC 438, 25 RR 1001 (1963); Speidel Broadcasting Corp., 35 FCC 74, 25 RR 723, 35 FCC 755, 1 RR 2d 726 (1963), affirmed Speidel Broadcasting Corp. v. FCC, Case No. 18318, U.S. Court of Appeals, District of Columbia Circuit, July 3, 1964; and Monroeville Broadcasting Co., 35 FCC 657, 1 RR 2d 607 (1963), 36 FCC 296, 1 RR 2d 993 (1964).¹⁰ In each of these cases, the Commission held that, for 307(b) purposes, an applicant which specified a suburb as its principal city, and whose proposed operation would provide no less than a 2.0 mv/m signal over at least 65% of the central city, should be treated as an applicant for the central city. In each of these cases, the population of the suburb was approximately 50,000 or less.

¹⁰In Northern Indiana Broadcasters, Inc., FCC 64R-407, released August 10, 1964, the Review Board applied the underlying principle of Radio Crawfordsville, Inc., to a ten per cent rule case involving Mishawaka, Indiana, a suburban community with a population of 33,361. Because of the relatively small size of Mishawaka, it was not necessary for the Board to reach the question presented by a suburban community with a population substantially in excess of 50,000.

29. Pertinent to a consideration of the contention thus advanced by Jupiter as to whether Radio's proposal should, for 307(b) purposes, be treated as a proposal for Newark or the larger New York City complex, is the Commission's Notice of Proposed Rule-Making in re Amendment of Part 3 of the Commission's Rules regarding AM station assignment, FCC 63-468, 25 RR 1615, and the subsequent Report and Order, FCC 64-609, 2 RR 2d 1658. In paragraph 44 of the Notice, the Commission referred to a proposed rule which would preclude grants of applications intended to provide a multiple service to a large community while ostensibly providing a first local outlet to a suburb; under this proposed rule, grants of such applications would be precluded if the suburban community had a population of less than 50,000 and the proposal would place a 2.0 mv/m signal over a city in excess of 50,000. The Commission indicated that it wished to discourage new suburban facilities which are merely sub-standard big city stations. In further explanation of this proposal, the Commission, in footnote 51 of the Notice stated in part as follows:

"Applications of this type have, under our present rules, come to be a source of major concern to the Commission. The problem has been most acute in two areas: Applicants seeking to gain a comparative '307(b) advantage' have come to specify small

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communities adjacent to large cities so that they may, nominally, provide a first local service to the small town. The applicant's signal, of course, provides excellent coverage to the big city. A similar problem has arisen in the case of applicants seeking to take advantage of the nighttime 'first local service exception' to par. 3.28(d)(3) of the Rules"

With reference to this proposed rule, the Commission, in paragraph 35 of its subsequent Report and Order, supra, stated:

"35. A 'note' to the table proposed in the Notice would have barred a new suburban station placing a 2 mv/m signal over more than 25% of the area of a city in excess of 50,000 population. Upon consideration of the comments regarding this 'note', we have concluded that the proposal would produce undesired results in too many cases to justify its adoption. (In areas of high ground conductivity, for example, new stations assigned on low frequencies would have had to be located an unreasonably large distance from metropolitan centers.) We shall continue to examine suburban applications closely, on a case-by-case basis, to determine whether they should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city. See Huntington Broadcasting Company v. FCC, 89 U.S. App. D.C. 222, 192 F.2d 33 [7 RR 2030], and Denver Broadcasting Company, 28 FCC 1060, 19 Pike and Fischer RR 1205."

30. While the Commission, in the cited quotations, clearly indicated its concern with respect to proposals for suburban communities of less than 50,000 population, there is no indication that this same concern extends to suburban communities with populations substantially in excess of 50,000. The implication of the Commission's statement in the Notice and in its Report and Order is to the contrary. Thus, had it been possible to frame a rule which would not have had undesired effects in areas of high ground conductivity (see the quotation, supra, from paragraph 35 of the Report and Order), it is reasonable to infer that the necessity of examining suburban applications on a case-by-case basis (see paragraph 35 of the Report and Order, quoted supra) would have been eliminated; applications which come within the purview of the proposed rule would have been de-

nied, and those not coming within the purview of the proposed rule would no longer be treated on a case-by-case basis, but would, instead,

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be treated as applications for the suburban community. Implicit in the Commission's statements in both its Notice and in its Report and Order is an underlying policy to limit to suburban communities of 50,000 or less the case-by-case consideration of whether proposals for the suburban communities "should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city." See Report and Order, quoted supra.

31. In light of the policy thus enunciated by the Commission, together with the fact that the suburban communities in Radio Crawfordsville, Speidel¹¹ and Massillon had populations of approximately 50,000 or less, we reject Jupiter's contention that Radio's proposal for Elizabeth, which has a population of 107,000, should be treated as a proposal for Newark or for the larger New York-Northeastern New Jersey Urbanized Area. In view of the Commission's policy, as out-

¹¹Speidel proposed a 10 kw operation with a directional antenna that would have directed the main lobe of radiation toward Dayton rather than Kettering, resulting in the proposed 25 mv/m contour embracing all of Dayton, but only 60 per cent of the designated community, Kettering. Speidel would have placed a 2 mv/m signal over more than 99 per cent of the urbanized area of Dayton. Speidel's antenna would have been located 4.5 miles from Kettering's nearest city limit, but only 2.5 miles from the nearest part of Dayton's city limits. Kettering had a 1960 population of 54,462 persons; Dayton, 262,332. The urbanized area of Dayton had a 1960 population of 501,664. In the proceeding before us, there are no similar facts which would indicate that the Elizabeth applicant was making a special effort to serve Newark.

lined above, the mere fact that Radio's proposed operation would serve not only Elizabeth but also most of Newark, does not of itself require that it not be treated as an Elizabeth proposal for 307(b) purposes. Jupiter does not contend, nor is it suggested by any of the facts recited in the Initial Decision, that Radio's proposal was deliberately engineered to give it wide coverage.¹² No unfavorable inferences as to Radio's intention can be drawn, as Jupiter seeks to do, from the fact that Radio proposes to operate at 500 watts, which is twice the minimum power for a Class II station; operating at 500 watts, Radio is proposing a low power station. Jupiter does not contend, much less make a showing, that

¹²Radio's proposed site is located approximately one mile outside the limits of Elizabeth, in Linden, New Jersey. Linden lies contiguous to, and to the southwest of Elizabeth, while Newark is located contiguous to, but north of Elizabeth. Radio's proposal is a non-directional one, operating with but 500 watts on a Class II frequency, the maximum power permitted being 50,000 watts.

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Radio's proposed programming is geared to the needs of Newark or of other areas in preference to the needs of Elizabeth, nor does Jupiter make any showing that Radio's proposal was engineered to secure maximum coverage of Newark or other areas beyond Elizabeth.

32. ~~Jupiter's~~ contentions concerning the relative needs of Elizabeth and Matawan for an additional reception service are completely without merit. It seems to contend, in effect, that because adjoining Newark has three standard broadcast stations, Elizabeth has no need for an additional reception service, whereas Matawan, though it is served by 10 standard broadcast stations, is not served by a standard

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broadcast station within its immediate vicinity, and that it therefore has a pressing need for an additional reception service. We agree that Elizabeth does not have a need for an additional reception service, inasmuch as it is already served by a minimum of 10 stations. However, we do not agree that the needs of Matawan for an additional reception service are significantly greater. While weight has, in appropriate circumstances, been given to the distance of the stations which provide reception services to a community, significance has been attached to the factor of distance only where the stations providing such service are located at very substantial distances away. See Democrat Printing v. FCC, 202 F.2d 298, n. 10, 7 RR 2138 (1952); Eastside Broadcasting Co., FCC 64R-419, 3 RR 2d 505. No such substantial distances are involved in the stations now serving Matawan; there are numerous stations in New York City, only four miles away, and in other communities in the New York-New Jersey metropolitan complex, which provide a reception service to Matawan. Nor is there any evidence to indicate that the stations now serving Matawan do not fulfill its reception needs, as distinguished from its transmission needs. If Jupiter desired to make a showing that Matawan's reception needs were not being met by the stations now serving Matawan, it should have sought the addition of a specific programming issue for this purpose. See Cookeville Broadcasting Co., FCC 60-101, 19 RR 897.

33. Jupiter also appears to contend that Elizabeth's needs for a local outlet are met by the three stations in Newark. This contention rests upon the fact that the studios of these stations, though located in Newark, are readily accessible to the residents of Elizabeth. The proximity of the Newark stations to Elizabeth does not, in and of itself, detract from the presumption that Elizabeth needs a first local outlet. See Star of the Plains Broadcasting Company

v. FCC, 267 F.2d 629, 18 RR 2072 (1957). Absent evidence to the effect that the Newark stations' programming meets Elizabeth's needs for a local outlet, it cannot be assumed that Elizabeth's need for a local outlet has been satisfied. No such evidence was presented in this case, and hence, under Star of the Plains, it cannot be presumed that Elizabeth's need for a first local outlet is reduced by the proximity of the Newark stations.

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34. As has been indicated, none of the three communities involved in this proceeding has its own standard broadcast station. As has also been indicated, no showing has been made that any of these communities does not have a need for a first local outlet for self-expression, and hence it must be presumed that each of the communities has a need for such local outlet. Neither Matawan nor Somerville is close to or readily accessible to a large city, and it may therefore be assumed that they are of importance to their adjacent areas. Elizabeth, on the other hand, because of its geographical proximity to Newark and New York City, may be of lesser importance to the geographical areas adjacent to it than is normally the case of a city of its size. Notwithstanding these considerations, the conclusion is inescapable that Elizabeth's presumptive need for a first local outlet for self-expression must be deemed to exceed the need of either Matawan or Somerville for a first local outlet. The population of each of the latter two communities is less than 13,000, and the population of Elizabeth exceeds 107,000. Even assuming that the importance of Matawan and Somerville is greater than that reflected by their respective populations, the populations of Elizabeth, as contrasted with that of Matawan and of Somerville,

requires that it be preferred insofar as the need for a first local outlet for self-expression is concerned.

35. It is strenuously contended, however, that Elizabeth's needs for a reception service are more satisfactorily met than the similar needs of the other two communities, and that Elizabeth should not, therefore, be preferred. As was indicated earlier in this decision, no special programming issue was sought by any of the parties to permit a showing to be made that the reception needs of either Matawan or Somerville were not as satisfactorily met as those of Elizabeth. It is contended, however, on behalf of the Matawan applicant, that the distance between Matawan and New York City, though less than five miles by air, is some fifty miles by road. This does not, in and of itself, establish that Matawan is located in a remote area or that it is underserved. Both Matawan and Elizabeth receive primary service from ten stations; Somerville receives service from seven stations, and an eighth station serves one-half of Somerville. In view of this abundance of service to each of the communities, a 307(b) choice cannot be made upon the basis of the respective needs of the three communities for an additional reception service. The abundance of service available to Matawan underscores the weakness of the argument of the Matawan applicant that the reception needs of its community are not adequately met. Even granting that Matawan's location vis-a-vis the stations serving it is not as favorable as is the location of Elizabeth, it does not follow that it is underserved and is entitled to a degree of preference over Elizabeth insofar as its reception needs are concerned. A contention that a community, which receives service from ten stations, is nevertheless significantly underserved (either in a comparative or in an

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absolute sense), can be given no credence in the absence of a record showing that the programming of the stations which provide a primary signal to that community does not in fact meet the reception needs of that community. As noted above, no such showing was made by the Matawan applicant.

36. In the light of the foregoing, it is concluded that no significant 307(b) preference can be awarded to any of the three communities insofar as their reception needs are concerned. Because Elizabeth's need for a first local outlet for self-expression is greater than that of Matawan or Somerville, it is concluded that Elizabeth must be preferred, and that a grant of Radio's application would best serve the public interest, convenience and necessity.

ACCORDINGLY, IT IS ORDERED, This 21st day of January, 1965 That the applications of Jupiter Associates, Inc. (BP-14178) and William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company (BP-14234), for construction permits for new standard broadcast stations at Matawan and Somerville, New Jersey, respectively, ARE DENIED; and the application of Radio Elizabeth, Inc. (BP-14812) for a construction permit for a new standard broadcast station at Elizabeth, New Jersey (1530 kc, 500 w, Day) IS GRANTED, subject to the following conditions:

1. Permittee shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation [Media Enterprises, Inc.], licensee of WFYI, for increased power as requested in BP-14238.
2. Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of

the Commission Rules are not extended to this authorization, and such operation is precluded.

/s/ Horace E. Sloane
Member, Review Board
Federal Communications
Commission

Attachment.

Released: January 25, 1965

[980]

APPENDIX

Rulings on Exceptions to Examiner's Initial Decision

Exceptions of Broadcast Bureau

<u>Exception No.</u>	<u>Ruling</u>
1, 2, 3, 4, 5, 6	<u>Granted.</u>
7, 8	<u>Denied.</u> See paragraph 24 of the Decision. Further, to the extent that these exceptions question Somerset's candor, they are irrelevant, inasmuch as its candor is not in issue and the Bureau never requested enlargement of the issues to explore this question.

Exceptions of Interstate Broadcasting Company, Inc.

1, 2	<u>Denied</u> for the reasons stated in the Decision.
3	<u>Denied</u> as not supported by the record.

Exceptions of Somerset County Broadcasting Company

1	<u>Granted.</u> See paragraphs 13-23 of the Decision.
2, 3	<u>Denied</u> as not of decisional significance.
4, 10, 11, 12, 13, 14	<u>Denied</u> for reasons stated in the Decision.
5	<u>Granted.</u> See paragraph 20 of the Decision.

- 6, 9 Granted to extent shown in the Decision.
- 7 Denied. See paragraph 22 of the Decision.
- 8 Denied. See paragraph 20 of the Decision.
- 15 Denied. For the reasons stated in the Decision, Elizabeth must be preferred over both Somerville and Matawan.

Exceptions of Jupiter Associates, Inc.

- 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 41 Denied as not of decisional significance.

[981]

<u>Exception No.</u>	<u>Ruling</u>
5	<u>Denied</u> as not relevant under the issues. This exception concerns evidence involving programming, a matter not within the ambit of the issues.
9, 27, 28, 32, 34	<u>Denied</u> . Acceptance of Somerset Exhibit No. 4 was not prejudicial to other parties. Further, Somerset could have amended its application. See <u>Neil N. Levitt</u> , 33 FCC 720, 24 RR 384 (1962).
10	<u>Denied</u> . See paragraph 24 of the Decision.
11, 30	<u>Denied</u> . Acceptance of Jupiter's Exhibit No. 26 concerning a writ of attachment is not relevant to a determination of Somerset's financial qualifications; the record shows that the bank made its loan commitment with full knowledge of the writ.
20	<u>Denied</u> . The finding excepted to is supported by the record. (Somerset's exception 20 properly should be directed to finding 23 of the Initial Decision.)

- 29, 33, 37 Denied. See paragraph 24 of the Decision.
See also ruling on Exception No. 9.
- 31 Denied. See paragraph 24 of the Decision
and also ruling on Bureau's Exceptions 7
and 8.
- 35 Denied. For reasons stated in the Decision.
- 36 Denied. See paragraph 22 of the Decision.
- 38 Denied. See paragraph 20 of the Decision.
- 39 Denied. However, see paragraph 34 and 35
of the Decision.
- 40 Denied. The conclusion is adequately sup-
ported by findings.
- 42, 43,* 45 Denied for the reasons stated in the Decision.

* No Exception No. 44 is included in the Exceptions filed by Jupiter Associates

[982]

Concurring Statement of Board Member
Joseph N. Nelson

I concur in the result reached; however, I feel that because of certain past Board statements which, I believe, are at odds with the position taken in the instant case, the Decision herein requires clarification and supplementation.

In Northern Indiana Broadcasters, Inc., (FCC 64R-407) released August 10, 1964, a majority of the Review Board held that the "Radio Crawfordsville" doctrine applied to "10% rule" cases as well as "307 (b)" cases. In the course of its Memorandum Opinion and Order in said case, the Board referred to the same Notice of Proposed Rule Making (FCC 63-468) and Report and Order (FCC 64-609) mentioned in the instant Decision and stated, among other things, that:

"Both the Notice and the Report and Order thus
serve to confirm what had previously been

heralded in Cook, supra, namely, that coverage of the central City is the critical criterion in both ten percent rule and 307(b) cases."

The Board went on to say that even where a "separate community" issue had been framed, "the question of coverage of the Central City is controlling."

My dissent in Northern Indiana was based on my view that coverage alone was not controlling; that coverage was one of a number of factors to be considered in cases such as the one before us. As the Commission held in the Crawfordsville case, these factors these factors include, among others, "class, frequency, power and and coverage." And the policy expressed in the Crawfordsville case, the Commission held, was a reiteration of the policy enunciated in the Huntington case.

Adherence to the position taken by the Board in Northern Indiana would require that the application for Elizabeth be considered as an application for Newark. Under these circumstances, Elizabeth could not be preferred under Section 307(b). In my view, however, Elizabeth is a separate community, is not a suburb of Newark, is not within the contemplation of the holdings in Huntington and Crawfordsville and is to be preferred under straight 307(b) considerations, Northern Indiana to the contrary notwithstanding.

[1135]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox not participating.

1. This proceeding involves the mutually exclusive applications for construction permits to operate new class II standard broadcast stations, daytime only, on 1530 kilocycles, of (a) Jupiter Associates, Inc. (hereinafter Jupiter), which proposes directional operation with

500 watts of power at Matawan, New Jersey; (b) William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company (hereinafter Somerset), which proposes directional operation with 1000 watts of power at Somerville, New Jersey; and (c) Radio Elizabeth, Inc. (hereinafter Radio), which proposes non-directional operation with 500 watts of power at Elizabeth, New Jersey. Each of the specified station locations is within, or very near, the New York-Northeastern New Jersey Urbanized Area as delineated by the Bureau of the Census in the 1960 Census of Population.

2. Both the Hearing Examiner's Initial Decision and the Review Board's Decision would have granted Radio's application. Applications for review of the Board's Decision were filed by Jupiter and Somerset. Because this proceeding involved important policy questions similar to those in two other proceedings, by our Order (FCC 65-591), released July 9, 1965, we granted the applications for review and permitted the parties to file briefs and to present arguments before the Commission,

[1136]

en banc, on October 8, 1965. The briefs and arguments of the parties in this proceeding have provided valuable assistance in clarifying the standards that should be applied to determine which application would better serve the public interest when one or more of the proposed stations is to be located in a suburban community and would serve adjacent metropolitan areas.

3. Our examination of these applications reveals that Jupiter and Radio propose 5 mv/m daytime service within the geographic boundaries of at least one other community of over 50,000 persons and with a population at least twice as large as that of the applicants' specified station locations. Accordingly, we are persuaded for the

reasons stated in our Policy Statement (FCC 65-1153), adopted December 22, 1965, that a determination should be made in this proceeding whether each of these two suburban proposals will realistically serve its own specified station location or some other larger community. We shall therefore revise the issues in this proceeding so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city (much of which has already been adduced), the parties may fully explore all matters relating to the need for each of these proposals. Thus, each of these two applicants will be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations, and the extent to which its program proposals will meet those needs. Additionally, each of these two applicants will be expected to adduce evidence as to whether the projected sources of advertising revenues from within its specified station location are adequate to support its proposal as compared with its projected sources from all other areas. Since Somerset's proposal does not fall within our test, we will not enlarge the issues in this proceeding with respect to its application.

4. An applicant who fails to establish that it will realistically serve its specified station location under the programming and revenues issue will be deemed to propose to serve the most populous community whose geographic boundaries are penetrated by its 5 mv/m daytime contour, unless the evidence establishes that it will realistically serve a third community which also receives the requisite coverage.¹ Accordingly, an issue will also be added to determine

¹See paragraph 11 and especially footnote 1 appended thereto of our Policy Statement, supra, for the effect of such service to a third community.

whether these two applicants meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for a station assigned to the appropriate larger community. Finally, the burden of proof with respect to these additional issues will be upon the individual applicants in each instance.

[1137]

ACCORDINGLY, IT IS ORDERED, This 22nd day of December, 1965, that this proceeding IS REMANDED to Hearing Examiner Jay A. Kyle for further hearing and for preparation of a Supplemental Initial Decision consistent with this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE HEREBY ENLARGED as follows:

- (a) To determine whether each of the proposals of Jupiter Associates, Inc., and Radio Elizabeth, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:
 - (1) The extent to which each specified station location has been ascertained by each of the two applicants to have separate and distinct programming needs;
 - (2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;
 - (3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and
 - (4) The extent to which the projected sources of each applicant's advertising revenues

within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

- (b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31 and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: December 27, 1965

[2928]

SUPPLEMENTAL INITIAL DECISION OF
HEARING EXAMINER JAY A. KYLE

Issued July 25, 1967; Released July 31, 1967

Preliminary Statement

1. This remand involves three mutually exclusive applications for a new Class II standard broadcast station (1530 kc, day). Jupiter Associates, Inc. (Jupiter) seeks a construction permit to locate the facility at Matawan, New Jersey, with 500 watts DA.

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Somerset County Broadcasting Company (Somerset) seeks to locate its proposed facility at Somerville, New Jersey, and operate with 1 kw, DA. The third applicant is Radio Elizabeth, Inc. (Radio Elizabeth) which requests a construction permit for Elizabeth, New Jersey, to operate with 500 watts, non-directionally.

2. The three applications were designated for hearing on September 11, 1962 (FCC 62-926). Subsequently, by Memorandum Opinion and Order (FCC 63R-36) a 25 mv/m overlap issue was added respecting Radio Elizabeth's application on January 21, 1963. After extensive hearings the Hearing Examiner released an Initial Decision on December 10, 1963 (38 FCC 339), in which he recommended a grant of Radio Elizabeth's application and a denial of the Jupiter and Somerset applications.

3. In arriving at that recommendation, the Hearing Examiner concluded (a) that all three applicants were basically qualified; (b) that, therefore, all three applicants were entitled to 47 USC, Sec. 307(b) consideration; (c) that each applicant would bring a first local transmission service to its respective community; (d) that the

(population 107,698) need for a first local transmission service overwhelmingly outweighed either Matawan's (population 5,097) or Somerville's (population 12,458) need for such a service. (See 38 FCC 339, 357, paras. 23-27.) Jupiter and Somerset excepted to the Initial Decision. Upon appeal this decision was affirmed by the Review Board in a decision released January 25, 1965 (38 FCC 321). The Review Board concluded, as did the Hearing Examiner, that the Radio Elizabeth proposal should be preferred under Section 307(b).

4. Jupiter and Somerset subsequently filed applications for review with the Commission. On July 29, 1965, the Commission scheduled oral argument to consider the question of what 307(b) standards should apply in the case of suburban community applications.¹ The oral argument was held on October 8, 1965, and as a result thereof the Commission on December 27, 1965, issued its Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (2 FCC 2d 190). The remand in the instant proceeding, as well as in Jobbins, Monroeville, Boardman, Northern Indiana and Naugatuck Valley, followed the adoption of the new policy.

¹ There were other proceedings involved in the suburban community question pending at that time, namely, Charles W. Jobbins, et al., 2 FCC 2d 197, Monroeville Broadcasting Company, et al., 2 FCC 2d 200, Boardman Broadcasting Company, et al., 2 FCC 2d 335, Northern Indiana Broadcasters, Inc. (___ FCC 2d ___), released June 20, 1967, and Naugatuck Valley Service, Inc. (___ FCC 2d ___), released July 7, 1967.

[2930]

5. Under the new policy, when an applicant's proposed 5 mv/m daytime contour penetrates the geographic boundaries of another community with a population of over 50,000 people and having at

least twice the population of the applicant's specified community, then the applicant is presumed to be realistically proposing to serve that a larger community rather than his specified community (2 FCC 2d 190, 193, para. 8).

6. If the applicant fails to rebut that presumption, the applicant's proposal can still be considered an application for the larger community if it meets all the Commission's technical rules for stations assigned to that larger community. However, if it fails to do either, i.e., rebut the presumption or qualify for the larger community, the policy statement plainly relates that the application will be denied (2 FCC 2d 190, 194, para. 11).

7. As stated above, the Commission remanded the instant proceeding on issues consistent with that policy (2 FCC 2d 200). However, the remand issues were designated against only two of the applicants, namely, Jupiter and Radio Elizabeth. The Commission stated that Somerset's proposal did not fall within the test. Therefore, the issues were not being enlarged respecting the application for Somerville, New Jersey (2 FCC 2d 203, 204). In the remand, respecting the proposals of Jupiter and Radio Elizabeth, the Commission said:

"Our examination of these applications reveals that Jupiter and Radio propose 5 mv/m daytime service within the geographic boundaries of at least one other community of over 50,000 persons and with a population of at least twice as large as that of the applicants' specified station locations. Accordingly, we are persuaded for the reasons stated in our policy statement (FCC 65-1153), adopted December 22, 1965, that a determination should be made in this proceeding whether each of these two suburban proposals will realistically serve its own specified station location or some other larger community. We shall, therefore, revise the issues in this proceeding so that, in addition to the usual 307 (a) evidence concerning the independence of a sub-

urban community from its central city (much of which has already been adduced), the parties may fully explore

[2931]

all matters relating to the need for each of these proposals. Thus, each of these two applicants will be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations, and the extent to which its program proposals will meet those needs."

8. The remanded issues read as follows:

"(a) To determine whether each of the proposals of Jupiter Associates, Inc., and Radio Elizabeth, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

- (1) The extent to which each specified station location has been ascertained by each of the two applicants to have separate and distinct programming needs;
- (2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;
- (3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and
- (4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

UF

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service."

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9. Further hearing conferences were held on January 19 and May 20, 1966, and January 9, 1967. Further evidentiary hearings were held on June 9, September 1, 12, 13, 22, 23, November 21, 1966, and March 28, 1967. The record was again closed by order released April 11, 1967. On June 2, 1967, the three applicants, as well as the Broadcast Bureau, filed proposed findings of fact and conclusions of law. Replies were filed on June 21, 1967, for Jupiter and Somerset.

Findings of Fact

10. While many of the engineering and other facets are set out fully in the Initial Decision, it is deemed essential to repeat certain facts in order to bring into perspective the matters to be resolved in making a determination under the remanded issues.

Jupiter

11. The specified station location for the Jupiter application is Borough of Matawan,² New Jersey. The Borough has a population of 5,097 persons.³ Matawan is approximately 4.2 miles from

² Matawan township is contiguous to Matawan Borough on three sides. All references to Matawan herein are to the borough unless otherwise indicated.

³ All population data herein are from the 1960 U.S. Census of population.

the nearest city limit to New York City, of which approximately three miles are over water. The area of Matawan is approximately 2.5 square miles. Although Matawan is only 4.2 miles from the nearest city limit of New York City, it is 45 miles by highway from Raritan Bay to Manhattan Island. This is brought about because there are no bridges or ferries connecting Matawan with the nearest point in New York, namely, Staten Island. Matawan is located in Monmouth County of which the Borough of Freehold is the county seat. Matawan is 14.3 miles south of Newark's city limits.

12. There are no AM, FM, or TV facilities assigned to Matawan. However, New York City, the presumed community served, has 18 AM, 17 FM, and 8 TV stations.

13. Jupiter's proposed transmitter site is located 0.9 mile west of the Matawan city limits. From that site and at the 500 watts power proposed, Jupiter's 5 mv/m contour penetrates Richmond Borough (Staten Island), which is part of New York City. It penetrates that borough for a distance of about 2.5 miles. The penetrated area contains 10,337 people or 0.13% of the population of New York City, which population totals 7,781,984. The proposed 5.0 mv/m contour does not penetrate any other community with a population

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of 50,000 or more. Jupiter's proposed 2.0 mv/m contour penetrates Richmond Borough about 7 miles including about 40% of the area of Richmond Borough. Overall, Jupiter's proposed 2 mv/m contour would embrace 474,000 people over an area of 221 square miles.

14. Jupiter's proposed 25 mv/m contour does not cross Raritan Bay. Obviously, it does not reach any part of New York City. Jupiter's main studio would be located in Matawan. Therefore, Jupiter's proposed operation does not comply with 47 CRF 73.30, 73.188

(b)(1), and 73.188(b)(2) of the Rules with respect to New York City.

15. Nine stations provide 0.5 mv/m or better primary service to all of the Jupiter proposal's rural area and two other stations would serve large portions of that area. None of the aforementioned rural area receives service from less than 10 stations. The following stations provide 2 mv/m or better service to Matawan: WABC, WCBS, WNBC, WNEW, WOR, WQXR, WMCA, WNYC, WLIB, WHN, WADO, WPOW, and WEVD (which shares time with WPOW) all New York City; WJRZ and WNJR, Newark, New Jersey, and WPAT, Paterson, New Jersey.

16. Jupiter also offered evidence showing the penetration of its proposed 5 mv/m contour into the New York-Northeastern New Jersey urbanized area, the total population of which is 14,114,927 persons. The total coverage of the 5 mv/m contour of Jupiter includes 97,308 persons in an area of 138 square miles. The population of New York City is 7,781,984 persons. Jupiter's proposed 5 mv/m contour includes a population of 10,337 persons within New York City, or 0.13% of the population of New York City. The proposed 5 mv/m contour includes a population of 58,896 within the New York-Northeastern New Jersey Urbanized Area, or 0.42% of the population.

Radio Elizabeth

17. The city of Elizabeth is part of the New York-Northeastern New Jersey Urbanized Area. Radio Elizabeth's station location is Elizabeth, New Jersey, which has a population of 107,698. Elizabeth is the county seat of Union County with a population of 504,255 persons. Elizabeth borders on the southern boundary of Newark, New Jersey, that has 405,200 persons. Elizabeth and Newark are separate cities. The latter city is in Essex County. Elizabeth is a seaport and is the 130th largest city in the United

States. It is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island) and Newark Bay. Elizabeth is connected to Staten Island by the Goethals Bridge. This city does not have any standard broadcast stations. Likewise, it does not have an FM station or

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television facility. As noted in the Initial Decision, only two cities in the United States and Puerto Rico have populations larger than Elizabeth that do not have standard broadcast stations. Newark, a presumed community to be served, has 3 AM, 4 FM, and 1 TV stations. The number of stations serving the City of New York, the other presumed community served, is found in paragraph 12, supra.

18. Radio Elizabeth's proposed transmitter site is located about 0.6 miles southwest of Elizabeth. The City of Elizabeth is between the transmitter site and the City of Newark. From that site, with 500 watts power, and its non-directional operation, this applicant's proposed 5.0 mv/m contour covers 3.85% of the area of New York City and 8,546 (0.11%) of that city's population (7,781,984). The station's proposed 2 mv/m contour covers portions of New York City which includes 80% of the area of Richmond Borough and 7% of the area of Brooklyn Borough. Thus, 361,505 people residing in New York are within Radio Elizabeth's proposed 2 mv/m contour. These 361,505 people represent 4.64% of the city's population. In all, Radio Elizabeth's proposed 2 mv/m contour would embrace 1,402,312 people over a 249 square mile area.

19. Turning now to Newark, which is immediately north and northeast of Elizabeth, Radio Elizabeth's 5.0 mv/m contour covers 27% of the area of Newark and embraces 109,409 persons in the neighboring city of Newark. This represents 27% of Newark's popu-

lation. The proposed 2.0 mv/m contour covers 92% of the area of Newark which includes 372,807 persons. Radio Elizabeth emphasizes that it is impossible on one hand to place the requisite signal over Elizabeth's business district and the most distant residential section and on the other hand comply with the Commission's Policy Statement. This applicant contends that the proposed 5.0 mv/m contour cannot conceivably be shaped to only cover the city of Elizabeth and not penetrate Newark and New York although a complex directional operation was proposed.

20. Radio Elizabeth's proposed 25 mv/m contour does not reach New York City, neither does it reach the city limits of Newark. This applicant's main studio will be located at Elizabeth, New Jersey. Therefore, the proposed operation of Radio Elizabeth does not comply with 47 CFR 73.30, 73.188(b)(1), and 73.188(b)(2) of the Commission's Rules with respect to either New York City or Newark.

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21. Twenty-one existing standard broadcast stations provide primary service (2.0 mv/m or greater) to the City of Elizabeth; WMCA, WNBC, WOR, WABC, WNYC, WCBS, WINS, WHN, WNEW, WLIB, WADO, WEVD, WPOW, WHOM, and WQXR — all in New York; WVNJ, WNJR, and WJRZ — Newark, New Jersey; WPAT, Paterson, New Jersey; WMTR, Morristown, New Jersey; and WAWZ, Zarephath, New Jersey.

22. On the matter of coverage Radio Elizabeth stresses one additional factor. It contends that certain existing AM stations in Newark and New York City put very strong signals into Newark. Those signals, it is contended, are of such intensity that the proposed Elizabeth signal is not comparable or competitive. For example, Stations WVNJ, and WJRZ, Newark, and WOR, WABC, and WNEW in New

York City provide a signal intensity in excess of 25 mv/m to all of Newark.

23. In the same connection, Jupiter points out that the minimum field intensity over the City of Elizabeth due to the day-time operation of Station WVNJ, Newark, is 22.7 mv/m; that such a field intensity of Station WNJR, Newark, is 23.4 mv/m; and that of WJRZ, Newark, is 14.1 mv/m.

Intermediate Engineering Findings

24. In noting paragraphs 13, 18, 19 and 20, supra, certain additional basic findings are revealed. First, Jupiter's proposed 5 mv/m penetration of New York City is de minimis. Jupiter's 5 mv/m contour would embrace only 10,337 of New York's 7,781,984 residents, or 0.13% of New York's population. Secondly, Radio Elizabeth's proposed 5 mv/m penetration of New York is de minimis. Its 5 mv/m contour would embrace only 8,546 of New York's 7,781,984 residents, or 0.11% of New York's population. And third, that Radio Elizabeth's proposed 5 mv/m penetration of Newark must be considered substantial; i.e., the 5 mv/m coverage of 109,404 of Newark's 405,220 residents is 27% of its population. However, Radio Elizabeth points out that Elizabeth's proximity to Newark makes it impossible to both comply with Elizabeth's coverage requirements and the suburban community policy. In addition, it is patently clear that Radio Elizabeth has not selected a transmitter site with Newark coverage in view because the proposed transmitter site is southwest of Elizabeth, while Newark is north and northeast of Elizabeth.

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25. The finding is made here that the Jupiter proposal was designed to serve Matawan and the rural areas nearby, while the Radio Elizabeth proposal is to be an Elizabeth station.

26. While endeavoring not to be repetitious, it is deemed of sufficient importance at this juncture to point out certain additional characteristics of both Matawan and Elizabeth from Findings which are to be found in the Initial Decision. The following paragraphs 27-43, inclusive, are found in Findings Nos. 6 through 32, inclusive, of the Initial Decision. However, all footnotes therein are eliminated.

27. Borough of Matawan, New Jersey: The site of the proposed Jupiter station is the Borough of Matawan, New Jersey. Matawan Township is contiguous to Matawan Borough on three sides. Matawan Borough has a population of 5,097 persons. Matawan is approximately 4.2 miles from the nearest city limit of New York City, of which approximately three miles are over water. Matawan has an area of approximately 2.5 square miles. Matawan Township has a population of 7,359 persons and a horseshoe-shaped area of approximately 7.5 square miles. Immediately contiguous to Matawan Township on the northeast lies Keyport Borough, with a population of 6,440. Matawan, Matawan Township and Keyport Borough are all situated in the northwest portion of Monmouth County, which has a population of 334,401 persons. The county seat of Monmouth County is the Borough of Freehold, which lies about 11 miles south of Matawan Borough in Matawan Township.

28. There are 158 business establishments located in Matawan Borough, consisting largely of retail and service organizations. The record does not disclose any substantial amount of manufacturing in Matawan, and Monmouth County is described as being predominately rural in character. The Census of Business reflects that Monmouth County has a total of 3,926 establishments, with total sales of \$403,671,000 in 1958 and at that time there were 293 wholesale trade establishments, having a total sales of \$122,713,000.00.

29. Matawan is governed by a council form of government and has a local court handling traffic and other minor offenses; a police

department, five volunteer fire departments, planning board, recreation commission, a public health association, a first aid squad and a public library. The Police Department consists of a Chief, Captain, and four full-time police, in addition to approximately 25 special part-time police for emergencies. The Matawan Free Public Library is supported

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by both Matawan and Matawan Township. The main library is in Matawan and has 10,000 volumes. There is a branch in Matawan Township which has 2,000 volumes. The Matawan Borough Council supervises the activities of the various boards and departments and also acts upon applications for building permits.

30. The major highways serving Matawan and Matawan Township are New Jersey Routes 18, 34, 79 and the Garden State Parkway. Public transportation service available to and from Matawan includes several daily Pennsylvania Railroad passenger runs to New York and Newark. There are no regular buses from Matawan to New York but there are several daily bus runs from nearby Keyport to Newark and New York.

31. There are only two churches in Matawan but there are several churches of various denominations in nearby Keyport and Holmdel Township. There is no Chamber of Commerce in Matawan. The two leading civic organizations are the Rotary Club and the Matawan Women's Club. In 1961 Matawan Borough and Matawan Township combined their public educational facilities into a common board, the Matawan Regional School Board. There are 3,300 pupils in the combined school system. Four members of the board are elected by the Borough and five by the Township. There are two commercial banks and one savings and loan association located in Matawan.

32. There is no standard broadcast station, and likewise neither an FM station nor a television station is situated in Matawan. The Matawan Journal is the local weekly newspaper. Both the Matawan Journal and the Keyport Weekly are published in Keyport by the Brown Publishing Company.

33. Telephone service is provided to Matawan by the Bell Telephone System, which is located in nearby Keyport. Electric service is furnished by the Jersey Central Power and Light Company. Natural gas is supplied by the New Jersey Natural Gas Company to certain areas around Matawan.

34. Matawan has a first class Post Office, which also serves Matawan Township. The Post Office has a Postmaster, Assistant Postmaster and 21 employees assigned to it. Its revenue is in excess of \$150,000.00 annually, having increased more than 30 percent in the last five years. The Matawan Post Office is responsible for the delivery of mail on five residential routes, with more than 2,000 families; and, one rural route,

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that serves more than 600 families. There are a total of 222 postal boxes installed in the Matawan Post Office. The Postmaster of Matawan testified that he had received approval from the postal authorities, for additional postal boxes, which will bring the total capacity to approximately 400.

35. Somerville, New Jersey: Somerville, New Jersey, is the governmental seat of Somerset County, and the Borough of Somerville. It has a population of 12,458 persons and lies in the New York-Northeastern New Jersey Urbanized Area. In 1782 the town of Somerville became the County Seat of Somerset County. Around the turn of the century, the development of water, rail and highway

transportation made Somerville the center of a growing industrial area, and in 1909 the town of Somerville was established as an independent municipality. It is located on the urbanized area's western limits about 18 miles west of New York's closest city limit, and about 19 miles west-southwest of the closest city limit of Elizabeth, New Jersey. The population of Somerset County is 143,913.

36. According to the 1958 United States Census of Manufacturers the community had 263 retail establishments with gross annual sales of almost 36.5 million dollars. At that time there were 26 wholesale trade establishments with 14 million dollars gross annual sales, and 11 manufacturing establishments that employed 411 people. Also under the listing of Selective Services, there were 122 establishments with total receipts of slightly over three and one quarter million dollars, with a payroll in excess of one million dollars. Additionally, adjacent to Somerville are several plants with more than 1,000 employees each which utilize Somerville as a trading center. The manufacturing payroll is \$1,657,000.00.

37. The Somerset Hospital located in Somerville has 213 beds and 40 bassinets. It currently has a fund drive campaign underway in an effort to raise additional funds to expand its capacity to 300 beds. The hospital has a teaching program, which includes an interns' and residents' program, and a nursing school with capacity of 75 students. In addition to the 500-member Women's Auxiliary Boards, the hospital also has 750 men, women and teen-age volunteers who work two to four hour shifts each week at the hospital.

38. There are four banking institutions operating in Somerville. Somerville schools include one high school, one junior high school, four elementary schools, one parochial school and three nursing schools. In addition to the Somerset County Welfare Board there are eight other health and welfare agencies in Somerville.

Other

county major health and welfare facilities headquartered in Somerville are the Somerset Cerebral Palsy Treatment Center which opened in 1951 and currently cares for 117 children, providing physical and speech therapy and other specialized instructions; the Immaculate Conception Speech Correction Center, offering courses for both children and adults afflicted with stuttering, sound or articulatory trouble; the Somerset County Blind Association, which provides a recreation program for the blind; and the Somerset County Guidance Center, a clinic which supplies Somerset County residents with diagnostic and consultation services for emotional disturbances, neuro-psychiatric and psychological problems.

39. Somerville has no AM, FM or TV transmittal facilities. There is no daily newspaper, but there are two weekly newspapers; namely, The Somerset Messenger Gazette and The South Somerville News which are published in Somerville.

40. There are 16 churches in Somerville of various religious denominations. There are more than 85 civic organizations and community service agencies in Somerville. Prominently included among these are national organizations, such as Kiwanis, Rotary, and Lions Clubs. There are also chapters of national fraternal organizations and veterans' groups. Certain groups are devoted to specific details of the community's welfare. These include such organizations as the Parent-Teacher Associations affiliated with each school, the volunteer fire companies, the rescue squads, groups concerned with the hospital and other matters pertaining to the area's health services, as well as numerous local and neighborhood civic organizations. Most of the national professional societies are represented in the Somerville area. In addition, many of the area's industries sponsor clubs for their employees.

41. Somerville is located at the intersection of major East-West and North-South Highways, and Routes 22, 202, and 206 provide ready accessibility to New York, Philadelphia and northern Pennsylvania, with New York City approximately one hour from Somerville by automobile, bus or train. The completion of Interstate Highways 78 and 287 will link the area directly with all other major turnpikes. The Central Railroad of New Jersey provides Somerville area residents with commuter and freight service to Jersey City and New York City to the east and Easton, Pennsylvania, to the west. The Philadelphia and Reading and the Lehigh Valley Railroads offer commuter and freight service to New York and Pennsylvania. In addition, there are several bus lines operating out of Somerville to New York, Pennsylvania, and nearby communities. Situated nearby in Hillsborough is the Manville Airport.

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42. The Somerset County Library, organized in 1930, was housed in the Court House Annex in Somerville until 1952 when it was moved to the County Administration Building. This library serves the people of Somerset County through eight local libraries, 19 library stations and 26 direct service stops of three mobiles. Library service is also maintained to all Somerville area public and private schools.

43. City of Elizabeth, New Jersey: The history of Elizabeth dates back to 1664 when the land comprising more than the present area of Elizabeth and Eastern Union County was purchased from Indians by early settlers. Sir George Carteret founded the town of Elizabeth which was made capital of the Province of New Jersey in 1668. Since that time Elizabeth has had a substantial growth.

44. Elizabeth, New Jersey, has a population of 107,698. It is the county seat of Union County, which has a population of 504,255

persons. Elizabeth is part of the New York-Northeastern New Jersey Urbanized Area. It is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island Sound) and Newark Bay. Elizabeth is connected to Staten Island by the Goethals Bridge. Elizabeth is adjacent to Newark, but Newark is in Essex County. The eastern most border of Elizabeth consists primarily of Newark Airport, industrial areas, and large areas undeveloped, which it is contended will be industrial areas. The Newark Airport therefore serves Elizabeth and has connections with 12 major airlines. The towns of Roselle Park, Roselle, Hillside, Linden and Union, to the west and north, bear a degree of similarity to Elizabeth. However, these towns are more residential in nature than is Elizabeth proper. There was some contention at the hearing that Elizabeth and Newark are the one and same community, but the record is replete with evidence that such is not the case. Therefore, essentially, they must be regarded as two separate cities because of their respective make-ups.

45. Elizabeth is a seaport. It has its own cultural, social, civic and charitable organizations. Elizabeth is the 130th largest city in the United States. It ranks 138th in net effective buying income and ranks 155th in total retail sales.

46. It is contended by this applicant that the records of the Commission reflect that only two cities in the United States and Puerto Rico having populations larger than that of Elizabeth do not have standard broadcast stations. In addition to not having a standard broadcast station, Elizabeth does not have an FM station or a television facility.

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47. Elizabeth and Union County provide access to the New Jersey Turnpike, New Jersey Garden State Parkway, the Goethals Bridge, the Holland and Lincoln Tunnels and the George Washington Bridge. United States Highways 1 and 22 traverse the city and county. The general area is served by the Pennsylvania, Jersey Central, Reading, Long Branch, Lehigh Valley and Rahway Valley Railroads. Likewise, service is rendered by 18 bus lines and 12 major motor freightways.

48. In 1960 the city began operating under a completely revised municipal charter and is presently governed by the mayor form of government. The city government contains numerous departments, agencies, boards and special organizations.

49. There are nine major banks in Elizabeth, which include three savings banks, two savings and loan associations and four commercial banks with total assets of 430 million dollars. Elizabeth is heavily industrialized and commercialized. The principal industries are four in number: sewing machines, pharmaceutical products, automotive, gas and chemicals, which employ approximately 32,000 out of a total 137,837 employees in Elizabeth alone. There are numerous small manufacturers and processors located in Elizabeth. The port of Elizabeth has just been completed. It was a 250 million dollar project, and reflects the vast trading area of Elizabeth and its environs. There are six retail centers in the city and many other neighborhood stores. The city has several multi-story structures. Elizabeth maintains its own urban development program, as well as having an industrial commission, which assists new industry to find suitable and profitable locations and homes in the city.

50. There are three major hospitals in Elizabeth with a total capacity of 918 beds. In the public school system of Elizabeth, there are three senior high schools, five junior high schools and 19 elementary schools. In addition to the public school system, there are three parochial senior high schools, 15 parochial elementary schools, one Jewish senior high school, one Jewish junior high school and one Jewish elementary school, one private boys' school and a private school for girls.

51. The Elizabeth Police Department has 240 policemen, 11 civilian administrators and 59 school crossing guards; while the Fire Department consists of 14 fire companies, approximately 30 pieces of equipment and 273 firemen.

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52. In Elizabeth there is only one newspaper, the Elizabeth Daily Journal. This paper is sold mostly in eastern Union County to approximately 55,000 subscribers. The Newark Evening News has a Union County edition that reaches into Newark but the record is void as to the number of subscribers in Elizabeth.

53. There are a total of 62 churches in Elizabeth representing many denominations. There are more than 30 organizations, civic and charitable, in the city, including such organizations as the American Cancer Society, Red Cross, YMCA, YWCA, YMHA, Lions Club, Soroptimist Club, Knights of Columbus, Elks, and Masonic Order.

Jupiter Associates, Inc.

✓ Remand Issue (a)(1)

54. Under the remanded issue (a)(1) each applicant must show the extent to which its specified station location has separate and distinct programming needs from the community served. In this instance, the presumed city is New York. The differing characteris-

tics between the specified locations on the one hand and New York on the other hand do not particularly afford proof of distinct and separate needs but they do provide fertile areas that an applicant could pursue to determine if such needs exist. Jupiter has submitted no 307(b) information on New York City. Consequently, no direct comparison can be made between the two communities.

55. Dr. Frederick P. Stafflinger, treasurer, director, and 20% stockholder in Jupiter, was in charge of preparing its program schedule in March 1960. The program schedule devised as a result of his research was reviewed by Jupiter stockholders and Washington, D.C., counsel and, subsequently revised to include program titles. This schedule was filed with Jupiter's application on May 25, 1960, and was amended in April 1962. Dr. Stafflinger has been a resident of Matawan for over forty years. In discussions with Ross W. Maghan and Joseph Pizzi, both of whom are 20% stockholders in Jupiter, it was concluded that since the Matawan area was largely a farm area there should be representation so far as the farm people were concerned, as well as for local and school news. Harry T. Ronson also a stockholder participated in making up the programming. It must be said, however, that this applicant never conducted a formal survey to determine Matawan's needs. As background material for preparing the

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original program draft, Dr. Stafflinger reviewed in the newspapers the programs of Stations WOR and WNEW in New York City, as well as an Asbury Park, New Jersey, station, WJLK. He also wrote for some programs carried by several smaller stations. He testified in part as follows:

"Well, in the beginning, I might say, we were not too well versed in it, and I did some research. I studied programs of other stations in the newspapers; I wrote for some programs of other stations, and I had some friends supply me with programs of their area."

The witness testified that there were very few personal contacts made by him because living in a small community people who hold positions of prominence eventually came to his office and he discussed programming with them. For instance, he discussed programming with the principal of a grammar school, Robert Hardies, along with two other local school teachers. Another individual with whom he discussed programming was Helen Waton, who was President of the Professional Business Women's Club. But, Dr. Stafflinger candidly admitted that there had been no "planned campaign" in ascertaining the programming needs for the Matawan station. The finding is that Dr. Stafflinger and some of the stockholders prepared the proposed program schedule predicated on their knowledge of the everyday life in a small community, with the exception of the contact with the school teachers referred to, Mrs. Waton, and the County Agricultural Agent. In summation, respecting this remanded issue, Jupiter based the programming needs of Matawan on (1) some means for publicizing local events such as local church events, fire department functions, and first-aid course; (2) an outlet for publicizing school and political activities; (3) local device for handling school closings, and (4) a need by local merchants for something more than weekly advertising provided for by the local weekly newspaper. Ross Maghan testified that the cost of advertising on New York City and New Jersey stations by Matawan merchants was prohibitive.

Remand Issue (a)(2)

56. Remanded issue (a)(2) requires Jupiter to show the extent to which any separate and distinct needs of the specified station loca-

tion are being met by existing standard broadcast stations. To meet its burden of proof under this issue Jupiter mailed interrogatories to all standard broadcast stations providing a 2.0 mv/m signal daytime to all of the Matawan borough. Of the 16 stations to which interrogatories were sent, replies were received from 14. The two stations not responding

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to the interrogatories were WVNJ, Newark,⁵ and WADO, New York City. It must be said that none of the 14 stations responding to the interrogatories concentrate on any of the specific claimed needs of Matawan.

57. With the exception of WJRZ, Newark, New Jersey, no 2.0 mv/m station devotes more than 1% of its current local news programming to local news from Matawan Borough. WJRZ devotes roughly 5%-10% of such programming to local news from Matawan Borough. No station maintains local news gathering facilities in Matawan Borough, but rather relies on the wire services and news tipsters for news from the Matawan area. Matawan news is broadcast by the majority of stations when deemed to be of importance and interest to all listeners within the station's service area. Station WABC in New York will broadcast a news item of paramount public interest to listeners in Matawan Borough. NB

58. Most stations interviewed would carry, upon request, public service announcements on behalf of groups and organizations in Matawan Borough. WOR-AM in New York indicated that it had done so for Temple Shalom of Matawan within the seven days preceding receipt of the interrogatories. WJRZ in Newark, New Jersey esti-

⁵See para. 81, infra.

mated that during an average week it would broadcast between 5 and 10 such announcements, and many other stations did broadcast public service announcements of general interest to residents of Matawan Borough.

59. In a deposition taken by legal counsel for Jupiter, Robert W. Addiss, Minister of the First Baptist Church of Matawan, testified that New York City stations will broadcast public announcements.

60. No station presently broadcasts any regular religious programs or services from or on behalf of Matawan Borough churches or religious congregations. None of the stations broadcast any programs of educational nature from or on behalf of Matawan schools. No station here under consideration currently presents any local originations from Matawan, nor is advertising solicited regularly from Matawan merchants.

[2945]

61. From the foregoing paragraphs 56-60, supra, it is clear that none of the 14 stations are adequately serving the needs of Matawan. There would be no barrier to a grant of the Jupiter application as it respects remanded issue (a)(2).

Remand Issue (a)(3)

62. Under this issue it is incumbent upon Jupiter to show the extent to which its program proposal will meet the specific, unsatisfied programming needs of its specified station location. As heretofore related, no extensive efforts were made by the applicant's stockholders to ascertain specifically the needs of the community. Rather they relied upon their knowledge as long-time residents of the tastes and desires for programming by a Matawan station. (See para. 55, supra.) While Jupiter did not provide the evidentiary hear-

ing record with program descriptions the program titles would appear to indicate events and happenings in Matawan which include the following week-day program schedule:

- A. A fifteen minute program scheduled for 6:00 a.m. will be devoted to national and local news, weather reports, announcements as to school closings and tide and water information.
- B. Fifteen minute programs at 7:00 a.m. and 9:00 a.m. will cover both national and local news, and announcements of Matawan area happenings.
- C. At 11:05 a.m., a program devoted to civic government news and announcements will be broadcast.
- D. A fifteen minute program is scheduled for 11:30 a.m. containing news of interest to farmers.
- E. Ten minutes of local news for Matawan, Keyport and their suburban environs is scheduled for 12:05 p.m.
- F. A five minute program at 3:05 p.m. entitled "Matawan-Keyport Bulletin" will contain announcements of importance for the day.
- G. Five minutes of high school and college news at 4:05 p.m. followed by local sports news at 5:05 p.m.

The format for Saturday and Sunday is about the same with certain minor scheduling revisions.

[2946]

N/a

Remand Issue (a)(4)

63. This remanded issue obligates Jupiter to show the extent to which the projected sources of its advertising revenues within its specified station location are adequate to support its proposal as compared with projected sources from all areas. The witness who testified respecting revenues of the proposed Matawan station was

Ross Maghan, the corporate president, director and 20% stockholder. When the original application was filed by Jupiter in 1960, projected first year revenues were placed at \$90,000. An exhibit offered by Jupiter and prepared in 1966 shows first year revenues estimated at \$75,000. Yet Maghan, while testifying at the evidentiary hearing, placed the estimated first year income at \$150,000. Maghan testified that in arriving at the \$75,000 estimate he used the rate card of nearby Station WJLK, Asbury Park,⁶ as a guide. Although he could not recall what the lowest WJLK rate was he projected an estimated rate per spot announcement of \$3.00 per minute. Then he testified that taking the \$3.00 per minute rate, he multiplied it by 600 minutes per week for 52 weeks, which resulted in the \$90,000 figure. Maghan testified that he interviewed possible area advertisers in estimating first year revenues which involved potential advertising on a radio station in Matawan, as well as to the communities including Keyport, Raritan township, Holmdel township and Madison, New Jersey. An exhibit offered by Jupiter in addition to the communities just named included two other townships. The record is silent, however, whether Maghan contacted any representatives of businesses respecting advertising on a Matawan radio station outside Matawan Borough. Maghan testified that he anticipated revenue from sources from Perth Amboy and Sayrewood (Madison township). The basis of income from these two communities is not reflected in the record. As heretofore set out in paragraph 28, supra, there are 158 business establishments⁷ in Matawan Borough

⁶ Asbury Park is also in Monmouth County, New Jersey.

⁷ There was received in evidence Jupiter Exhibit 33 which listed approximately 850 businesses in Holmdel Township, Marlboro Township, Matawan Township, Raritan Township, Matawan Borough, Middletown Township, and Keyport Borough.

but Maghan spoke only to 11 business concerns in Matawan Borough relative to advertising over a Matawan radio station. A breakdown of anticipated revenues by sources, national, regional, or local was not submitted by Jupiter as part of its case in chief. Likewise, Jupiter has given no estimate of how much revenue it would receive from all sources outside of Matawan either on an individual or collective basis.

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64. The estimate of potential revenues are somewhat indefinite and speculative, but because the station would be the first one in the borough it can be assumed that the station may be adequately financed for the first year.

Radio Elizabeth, Inc.

Remand Issue (a)(1)

65. The proposal of Radio Elizabeth is to operate a new Class II standard broadcast station at Elizabeth, New Jersey, on 1530 kc, daytime, with power of 500 watts, including a non-directional operation. This applicant's proposed service area, for all practical purposes, is equidistant in all directions. Consequently, it is not beaming the signal at one direction in expense of other directions. The population of Elizabeth, as heretofore stated, is 107,698 persons. The situation is that this applicant's 5.0 mv/m contour penetrates both New York City and Newark, New Jersey, therefore it could be presumed to be an applicant for one or both these two large cities and must consequently meet the new 307(b) suburban community issue, as heretofore set out. Respecting New York City, the penetrated area of Radio Elizabeth's 5.0 mv/m daytime operation embraces only 8,546 people which is 0.11% of the city's population of 7,781,984. The proposed 2.0 mv/m contour of Radio Elizabeth does not

give any substantial coverage to New York. There is nothing in the record that demonstrates to any degree that Elizabeth, New Jersey, is a suburb of New York City. Moreover, it is a county seat of a New Jersey county, namely, Union. Depositions were taken on behalf of Radio Elizabeth of 15 New York stations that provide a 2.0 mv/m signal to Elizabeth. The evidence on this point clearly indicates that the New York stations are not particularly concerned with serving Elizabeth and its environs. For instance, the New York City stations generally indicated that they did not broadcast public service announcements on behalf of groups and organizations of Elizabeth. Likewise, very little, if any, advertising was solicited in Elizabeth by the New York stations. Additionally, with one exception, the New York stations do not broadcast any religious programs or services in behalf of Elizabeth churches. One New York station carries a 1/2 hour program on behalf of the Jewish Educational Center in Elizabeth during the winter months only, which program would be of interest to the Jewish listeners throughout the general area of New York. Likewise, none of these stations presently broadcast any programs of an educational nature on behalf of Elizabeth schools. The stations in New York, from the evidence adduced at the hearing, apparently do not put on any programs presenting local talent from Elizabeth. To the same effect was that these stations had not presented

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any public affairs programs in the preceding six months specifically related and local to Elizabeth.

66. In the preceding six months none of the New York stations had broadcast any editorials specifically relating to affairs of Elizabeth. The stations also did not in the last local election carry any political broadcasts for candidates for local office in Elizabeth and,

further, in the preceding six months they did not broadcast any sporting events originating in Elizabeth or involving teams from that community. Only two stations in New York carried sports news concerning Elizabeth participants although there is testimony in the record that Elizabeth is a "sports conscious community." None of the New York stations currently present any local originations from Elizabeth and only three carry some semblance of weather news involving the general New York-New Jersey area. It is firmly established that Radio Elizabeth has rebutted the suburban community issue insofar as New York City is concerned. Under remanded issue (a)(1) Radio Elizabeth must show the extent to which its specified station location in Elizabeth, New Jersey, has separate and distinct programming needs from the two principal communities served, namely, New York City and Newark, New Jersey. To avoid repetition, see paragraphs 80, 81, 82, 83 and 84, infra, for details respecting Newark AM stations.

67. In the Initial Decision and Review Board decision heretofore referred to in paragraph 3, supra, there is definite reflection that Elizabeth, a city of 107,698 persons, is a large and substantial community, distinct from other nearby communities, particularly New York City and Newark. As pointed out heretofore, Elizabeth has no radio facility of its own and a grant of the proposal of Radio Elizabeth would bring a local facility for the first time to that city.

✓ There was not submitted any 307(b) information on New York, therefore, a comparison between these two communities cannot be made.

NB As it relates to Elizabeth and Newark, they are located in Union and Essex Counties, respectively. Each maintains its own form of local government, including urban development programs. The two cities maintain separate recreational and educational facilities; the political views of Newark are not necessarily those in common with

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Elizabeth and, as will be hereinafter noted, the characteristics of the populations of the two cities are not the same. For instance, see paragraph 69, infra, and footnote 8.

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68. There is testimony in the record by former Mayor Steven J. Bercik, as well as the present Mayor of Elizabeth, Mayor Thomas G. Dunn. Their testimony bears out the fact that Elizabeth is separate and distinct from Newark. It is not a suburb of Newark but has its own business, cultural, and social aspects. As a matter of fact, the evidence demonstrates that Newark and Elizabeth compete actively for business. As an illustration, both cities have seaports which vigorously compete for shipping.

Mayor Thomas G. Dunn

69. Mayor Dunn testified on the changing population characteristics of Elizabeth. He estimates that there are about 25 to 30 thousand people of Polish descent in Elizabeth. While this group is apparently the largest single population grouping, there has been a substantial influx of Cubans and Puerto Ricans into the city over the past five or six years. In fact, the influx has been so great that it has become the subject of a United States Senate Investigating Committee. Thus, Elizabeth now has a large Spanish speaking population. The record also indicates that there are about 12 to 18 thousand Negroes included in Elizabeth's population of 107,698.⁸ Consequently, Mayor Dunn feels that Elizabeth has a need for an outlet which can transmit information regarding race relations and civic

⁸The differing population characteristics of Elizabeth and Newark are clearly identified by the fact that only about 10% of Elizabeth's population are Negroes, as compared to 63% of Newark's population, i.e., 280,000 out of 405,220.

rights. Mayor Dunn also testified that New York radio stations often called him for beep-phone interviews. Likewise, he has appeared many times to tape public service announcements for WVNJ in Newark. This station has also interviewed him via telephone-type hook-up. The Mayor has appeared in a Polish oriented program on Sunday and, as mentioned above, he testified that there was a large Polish population in Elizabeth. Respecting WNJR at Newark, the Mayor testified that he had never requested to be permitted to use that station's facilities although he had been interviewed by the station at one time or another. It was his conclusion that he had been interviewed on the average of once a week for the last 20 months for some civic endeavor or purpose. He said in part that:

"I wish to call to your attention the fact that the radio stations located in Newark primarily deal with Newark and Essex County news, and only those events of a most extraordinary nature which occur in our community are broadcast by these radio stations."

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70. ~~At the remand hearing~~ Radio Elizabeth produced as a witness Edward J. DeGray, a radio consultant. His home is in White Plains, New York. He was employed by counsel for Radio Elizabeth to conduct certain studies and make surveys as he might deem necessary to determine (a) adequacy of the radio service presently available to the community of Elizabeth; (b) the type of station which Radio Elizabeth's proposal would represent from an economic and service standpoint; (c) the type of radio service which is needed by the Elizabeth community, and (d) whether this service would be provided as a result of the grant of the Radio Elizabeth application. Relative to the background of DeGray, as to his qualifications to conduct the sur-

veys at Elizabeth, it is pointed out that he had been in the industry since 1937 on the local, national and network levels in virtually every capacity other than the technical phase. He had been employed as auditor, personnel manager, local sales representative, national sales manager, assistant general manager, business manager, and secretary-treasurer of a radio licensee. For fourteen years of his career he had held key executive positions in CBS owned and operated stations, Radio Spot Sales, and Station Relations Departments. From 1955-1958 he was the head of Radio Station Relations for the American Broadcasting Company. During part of this period he was in charge of ABC's Stations Department which provided consulting services to affiliates of that network. The witness was president of the Radio Network of ABC, 1958-1960. He was also vice president in 1958-1960 of ABC-Paramount Theatres, Inc. Prior to making the survey in Elizabeth, DeGray had made a survey involving Channel 4, Paterson, New Jersey, two years previous to the Elizabeth survey. Paterson, like Elizabeth, is in northern New Jersey. Additionally, DeGray served on the Board of Directors of the National Association of Broadcasters. In preparing his evidentiary presentation, DeGray became generally familiar with Elizabeth and its principal political, social, economic and cultural features.

71. DeGray was retained as a consultant for Radio Elizabeth on March 4, 1966. He went to Elizabeth and had discussions with Dominick A. Mirabelli, president of this applicant, respecting the programming and other details relative to the application filed by Radio Elizabeth. DeGray testified that he did not know the other stockholders of Radio Elizabeth and that he did not design the programming which was filed with the original application. Likewise, DeGray did not make the determination that the first year revenues would total \$110,000 which were embodied in the application filed in 1961.

[2951]

He personally undertook and did interview 47 civic, business, religious and political leaders of the Elizabeth community. He obtained the names of these individuals through various sources. A list of these persons, with the positions in the community and the years that they have lived in the Elizabeth area, along with the date that they were interviewed by DeGray is found in the Appendix. Without detailing all the personal interviews conducted by DeGray, it is sufficient to say that the community leaders most frequently emphasized the need for the following:

NB

(1) Coverage of municipal and county news and issues including coverage of news in the suburbs of Elizabeth such as Linden, Roselle, Roselle Park, Hillside and Union;

(2) The need for quicker reporting of news particularly in the case of emergencies such as snowstorms, traffic information, dog bites, etc. Some of the persons interviewed emphasized that the recent murder in Elizabeth had been the occasion for considerable fright among the residents and that there had been no quick and effective means for keeping the city advised of developments in the case;

(3) The need for coverage of school programs and events was consistently emphasized;

(4) The need for informing the citizens more effectively in many areas was emphasized. Schools, redevelopment, city and county elections and traffic information were mentioned particularly as areas where the community needed greater and more immediate information;

(5) The need for greater coverage of local sports news and local sports events was mentioned frequently;

(6) The need for greater coverage of church news and church services was mentioned; and

new factors
 (7) Finally, a number of the community leaders interviewed stated that a recent change in the ownership of Elizabeth's newspaper had resulted in far less coverage of local news and events than had previously been the case and had also resulted in the termination of two editions per day so that the city has now but one edition. These civic leaders stated that there was, particularly in light of this circumstance, a need for an additional voice both for news, information and comment in the community.

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NB
 72. DeGray also testified that none of the business leaders interviewed considered that the area radio stations represent an attractive or effective means for advertising local business. Many of these businessmen had tried to use radio stations, particularly the Newark stations. *NB*

73. Starting on April 23, 1966, DeGray personally supervised a telephone survey designed to elicit from Elizabeth's residents information about the listening habits and their views on the radio service available in Elizabeth. While it is not deemed essential here to set out the details of the survey, it is to be noted that a total of 293 calls were attempted in the survey to which there were 153 responses. The girls who were detailed to make the telephone calls were assigned a random starting point in the Elizabeth telephone directory. DeGray did not personally employ the girls who made the survey as they were selected by an employment agency. The telephone survey was conducted from three separate rooms and the callers received their instructions as to how to proceed from DeGray. The results of the survey are set out in detail in an exhibit

presented by Radio Elizabeth and is a part of this record. However, it will not be elaborated on here, because it speaks for itself.

74. Based upon personal interviews, the telephone survey, and his knowledge of an familiarity with radio, DeGray reached the conclusion that the radio service which the residents of Elizabeth now received came principally from New York City stations and to a lesser extent from Newark stations was inadequate. He also concluded that the New York City and Newark stations were totally ineffective in providing any sort of significant local service, either in terms of local news and information, or as an outlet for local organizations such as churches, schools and other groups. DeGray also concluded that the present radio service available to residents of Elizabeth is not an effective advertising medium for that community in two particular senses. These out-of-city stations are neither practical nor suitable media for advertising of local businesses in Elizabeth as they demand payment for coverage which is of no interest to the local businesses in Elizabeth and further, because no single station in either Newark or New York, more than another, provides an effective means for reaching the people in Elizabeth. He also testified that Elizabeth and its own set of suburbs, particularly Roselle, Linden, Roselle Park, Hillside and Union, could produce local advertising revenues for support of a local station. He stated that there would not be advertising revenues of significant amounts from national and regional advertising.

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75. Between 1960 and 1965, residential development in Elizabeth, primarily in apartment construction, has added over 5,000 dwelling units. Between 1958 and 1963, Elizabeth's wholesale trade increased, i.e., the number of establishments increased 14.1%, and

total sales volume increased 159%. As a percentage of total sales in Union County, Elizabeth's total volume of sales increased from 22.2% in 1958 to 30.3% in 1963. Employment is on the increase, and in 1964, it reached an all-time high of 42,701.

76. A major portion of the Newark Airport is located within the Elizabeth city limits and a new airport complex is being constructed which will put the Newark Airport even closer to the Elizabeth central business district. An air terminal for private and business aircraft is located two miles from the city of Elizabeth. This is Linden Airport.

77. The trade area being served by Elizabeth has been identified by a survey of shoppers. Sixty percent of the shoppers originated from within Elizabeth, while the remaining forty percent come from an area extending to the west and south of Elizabeth. Exclusions from the trade area are areas lying within Newark and Staten Island. While Elizabeth's population has declined slightly between 1940 and 1960, the population within the Elizabeth trade area increased substantially during the same period, and increased slightly between 1960 and 1965. This is illustrated by the following table:

<u>Year</u>	<u>Union County</u>	<u>Population</u>	
		<u>Trade Area</u>	<u>Elizabeth</u>
1940	328,344	239,100	109,912
1950	398,138	284,300	112,817
1960	504,225	331,800	107,698
1965	545,000	342,000	110,000

78. The community leader survey conducted by Edward J. DeGray, referred to in paragraph 71, supra, consisting of some 47 business, civic, religious and political leaders, indicates, according to DeGray that Elizabeth needs an AM outlet for (a) coverage of municipal and county news and events, including coverage of news

from such suburban areas as Linden, Roselle, Roselle Park, Hillside and Union; (b) school news; (c) educational programs; (d) church news and programs; (e) local religious services and messages; (f) local issues

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of public importance; (g) local and area business news; (h) local news and sports events; (i) local civic and charitable campaigns; (j) local health and welfare information; (k) quicker reporting of emergency news; and (l) an additional voice in the community for news, information and comment in light of a recent change in ownership of Elizabeth's only daily newspaper. Mayor Dunn's testimony and the telephone survey substantially corroborates the community leader survey. Of the 47 community leaders interviewed by DeGray, 3 or 4 expressed no opinion about the adequacy of existing radio facilities.

Remand Issue (a)(2)

79. Under remanded issue (a)(2) Radio Elizabeth must show the extent to which any separate and distinct needs of Elizabeth are or are not being met by existing standard broadcast stations. At the outset it must be pointed out that Elizabeth, as did Jupiter, endeavored to meet this issue by sending written interrogatories to the 21 stations that presently place a 2.0 mv/m or greater signal over Elizabeth. However, because of a ruling by the Review Board (6 FCC 2d 13), adopted December 14, 1966, Radio Elizabeth took depositions to cure the Review Board's objections to the interrogatories referred to. Depositions were taken from the following individuals:

(1) Kenneth Reed of Station WINS, New York; (2) Jerry Graham of Station WNEW, New York; (3) William H. Schwarz of Station WNBC, New York; (4) Joseph Somerset of Station WPAT, Paterson,

New Jersey; (5) Maurice Benkoil of Station WCBS, New York; (6) Melvin Bartell of Station WHDO, New York; (7) David Neles of Station WEVD, New York; (8) Kenneth Gray of Station WMTR, New York; (9) Richard Novick of Station WLIB, New York; (10) Charles Baffin of Station WHOM, New York; (11) Ruth Masser of Station WMCA, New York; (12) Seymour Siegel of Station WNYC, New York; (13) Walter Nieman of Station WQXR, New York; (14) Roy Schwartz of Station WHN, New York; (15) N. L. Wilson of Station WAWZ, Zaraheth, New Jersey; (16) Richard Sklar of Station WABC, New York; (17) Arnold Brown of Station WPOW, New York; and (18) James McAleer of Station WOR, New York.⁹

80. Depositions were not taken by Radio Elizabeth on the three Newark stations, namely, Stations WVNJ, WNJR, and WJRZ. The reason for not taking the depositions from representatives of these Newark stations is quite clear. Somerset subpoenaed (1) Tim Howard Crow,

⁹ All these depositions were received in evidence except the McAleer deposition. (See Hearing Examiner's Memorandum Opinion and Order (FCC 67M-539) released March 19, 1967).

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Director of Quality Control for Rollins, Inc., licensee of WNJR, Newark, New Jersey; (2) Edward Scudder, Jr., president of Newark Broadcasting Corporation which operates WVNJ and WVNJ-FM, Newark, New Jersey, who is also president of the Newark News Publishing Company, and (3) Harry W. Reith, general manager of WJRZ Radio, Newark, New Jersey. Messrs. Crow, Scudder and Reith appeared at the evidentiary hearing on November 21, 1966, in Washington, D.C., and were interrogated by counsel for all of the re-

spective parties. The representatives of these three stations had previously been sent interrogatories by Radio Elizabeth.

81. As mentioned above, Radio Elizabeth sent interrogatories to certain New York and New Jersey stations and ultimately representatives from these stations testified either by deposition or at the evidentiary hearing. There are 18 stations involved which hold themselves out to serve the entire coverage area but, nevertheless, clearly do not concentrate on the specific needs of Elizabeth. The 18 stations referred to are set out in paragraph 79, supra. The record is void of any evidence that would bar a grant of the Radio Elizabeth application under remanded issue (a)(2) as it relates to these 18 stations. The second group are the three Newark stations, namely, WVNJ, WNJR, and WJRZ, that hold themselves out to serve their entire coverage area, and which by virtue of their geographical proximity to Elizabeth conceivably might be expected to meet certain specific needs of Elizabeth under certain circumstances. See paras. 82-85, infra. NB

82. WVNJ, Newark. WVNJ's transmitter is located about 11-1/2 miles from Elizabeth. A review of WVNJ's response to Radio Elizabeth's interrogatories indicates that WVNJ does not concentrate specifically on any of Elizabeth's needs. As noted before, Edward Scudder of WVNJ testified in this proceeding. He stated that WVNJ does not concentrate on Elizabeth because it serves some 50 other communities; that WVNJ is really regional in nature; and that WVNJ's programming therefore is not specifically directed at Elizabeth. Moreover, the regional character of WVNJ's operation is confirmed by the way it took a recent listener survey. In January of 1966, WVNJ contacted 219 organizations for the purpose of ascertaining the tastes of WVNJ's listening audience. The questionnaires were sent to four counties; i.e., Essex (where Newark is located),

Passaic, Bergen, and Union (where Elizabeth is located). One hundred fifteen of the 219 organizations contacted were located in Essex County; 42 were in Passaic County; 34 were in Bergen County; and only 28 were in Union County. Of the 28 Union County organizations, 22 of them were Elizabeth organizations. About 80% of the 219 organizations responded, but Scudder did not know how many of them were Elizabeth organizations.

 [2956]

83. WNJR, Newark. WNJR's studio is about 3 miles from Elizabeth. The station specializes in Negro programming. Thus, the facts clearly indicate that WNJR would concentrate its programming on Newark (with its Negro population of 280,000) to a far greater extent than it would on Elizabeth (with its estimated Negro population of 12,000 to 18,000). As heretofore pointed out, there is a different population characteristic of Elizabeth and Newark which reflects that about 10% of Elizabeth's population are Negroes as compared to 63% of Newark's population. In other words, 280,000 persons out of a total of 405,220 are Negroes in Newark. The Negro population in Newark is greater than the entire population of Elizabeth. Since Crow of WNJR testified that their programming is made up largely of music that has particular interest to the Negro audience because "it is both rhythm and blues and gospel music in nature" WNJR concerns itself with the Negro population located in various other communities besides New York. He¹⁰ listed Manhattan, Brooklyn, the Bronx, Flushing Jamaica, Staten Island, Union, Irvington, all in New York and New Jersey. Crow included Nutley, Rahway, Linden, Elizabeth and Jersey City. It is abundantly clear

¹⁰ Crow's home is in Wilmington, Delaware.

that Station WNJR has only an interest in the minority segment of the population of Elizabeth.

3 84. WJRZ, Newark. As indicated above, the witness on behalf of this station was Harry Reith, General Manager. He acknowledged that he had received the interrogatories from Radio Elizabeth and had responded on behalf of his station. The WJRZ transmitter is approximately 10 miles from Elizabeth. Actually the station's studios are closer to Elizabeth than the transmitter. He testified in part as follows:

Q. To the Radio Elizabeth interrogatory, your answer to Question 3(a) is that you would roughly estimate between 15 and 20 percent of your local news programming to be devoted to Elizabeth. Would that 15 to 20 percent include time devoted to public service announcements on behalf of Elizabeth organizations?

A. Yes, that figure is perhaps in the broadest sense of local news. It is news of Elizabeth, per se, as well as news of interest locally in Elizabeth, and public service time devoted to Elizabeth.

concl. [2957]

85. It is apparent from the testimony of Reith that WJRZ showed a limited sensitivity to Elizabeth's needs only insofar as news is concerned. The witness added that the station has two reporters who do field work in five counties in northern New Jersey, including Union County, of which Elizabeth is county seat. The witness testified that he estimated that approximately 50 to 55% of the revenues were received from regional and local sales lumped together. Of this total, the witness stated that advertising in Elizabeth would represent approximately 2% of the total sales. The wit-

ness also testified that they contacted the Elizabeth police and city officials not on a daily basis but on a weekly basis and they did not contact the Elizabeth hospitals on a regular basis. Reith testified that WJRZ keeps in contact with its audience needs through several methods. One method is by having its employees belong to civic organizations. However, Reith could not say whether any of WJRZ's employees belong to Elizabeth organizations. Recently, the station sent out a survey questionnaire to civic and community leaders. No questionnaires were sent to Elizabeth organizations. The station used a general public survey. This survey was sent principally to Newark residents. The station also asked for comments regarding its programming. It specifically solicited such comments over the air. Over the last two and one-half to three months, it has received 50 to 75 responses. None of the responses were from Elizabeth residents, and only 3 or 4 of these comments were from Union County.

Remand Issue (a)(3)

86. The Commission's remand order provides in issue (a)(3) that the applicant must show the extent to which its program proposal will meet the specific unsatisfied programming needs of its specified station location. As heretofore observed, DeGray did not prepare the programming for the Elizabeth station. He was employed as a consultant in March 1966, after the remand order, and made a study of the proposed programming.

87. Radio Elizabeth, among its exhibits, submitted a program schedule for Monday through Saturday which reads as follows:

Proposed Program Schedule

Monday - Saturday

5:59 A.M.	Sign On	
6:00-6:05	News and Weather	WS
6:05-6:15	Early Morning Song Fest.	RC

[2960]

6:15-6:30	Community News	LC
6:30-6:45	Early Morning Song Fest.	RS
6:45-7:00	Early Morning Song Fest.	RC
7:00-7:05	News and Weather	WC
7:05-7:15	Coffee Go Round	LS
7:15-7:30	Contemporary Music	RC
7:30-7:45	Contemporary Music	RS
7:45-8:00	Morning Devotional	RS
8:00-8:05	Local News	LS
8:05-8:30	Platter Party	RC
8:30-9:00	Polka Party	RC
9:00-9:05	News and Weather	WC
9:05-9:15	Sports Preview	LS
9:15-9:30	Salute to Elizabeth	LC
9:30-10:00	Italian Hour	RC
10:00-10:05	Local News	LS
10:05-10:30	Morning Frolics	RC
10:30-11:00	Morning Frolics	RC
11:00-11:05	News and Weather	WC
11:05-11:30	Rendezvous in Music	RC
11:30-12:00	Rendezvous in Music	RS
12:00-12:05 P.M.	News and Weather	WS
12:05-12:30	Mid-Day Music Hour	RC
12:30-1:00	Mid-Day Music Hour	RC
1:00-1:05	Local News	LC
1:05-1:30	Old-Timers Party	RC
1:30-2:00	Old-Timers Party	RC
2:00-2:05	News and Weather	WS
2:05-2:20	Musical Interlude	RC
2:20-2:30	Local News	LC
2:30-3:00	Teenage Party	RS
3:00-3:05	News and Weather	WC
3:05-3:30	Public Service	RS
3:30-3:45	Classroom Series	LS
3:45-4:00	Musical Interlude	RC
4:00-4:05	Local News	LS
4:05-4:15	Talk	LC
4:15-4:30	Sports Roundup	LS
4:30-4:45	Afternoon Frolics	RC
4:45-5:00	Afternoon Frolics	RS
5:00-5:05	Local News	LC
5:05-5:30	Album Selections	RC
5:30-5:55	Album Selections	RC
5:55-6:00	Local News	LS
6:00	Sign Off	

[2959]

For Sunday programming the proposed program schedule is the following:

Sunday

5:59 A.M.	Sign On	
6:00-6:05	News and Weather	WS
6:05-6:15	Early Morning Song Fest.	RS
6:15-6:30	Hymnal	RS
6:30-6:45	Early Morning Song Fest.	RS
6:45-7:00	Religious Music	RS
7:00-7:05	Local News	LC
7:05-7:15	Early Morning Song Fest.	RS
7:15-7:30	Church Service	LS
7:30-7:45	Sentimental Music Hour	RC
7:45-8:00	Sentimental Music Hour	RC
8:00-8:05	Local News	LC
8:05-8:30	Sentimental Music Hour	RS
8:30-9:00	Devotional	RC
9:00-9:05	News and Weather	WS
9:05-9:30	Coffee Time	RC
9:30-10:00	Church Service	LC
10:00-10:05	News and Weather	WC
10:05-10:30	Children's Time	RS
10:30-11:00	Sports Highlights	LC
11:00-11:05	News and Weather	WS
11:05-11:30	Musical Interlude	RC
11:30-12:00	The Suburban Farmer	LC
12:00-12:05 P.M.	News and Weather	WC
12:05-12:15	Local Schools Bulletin Board	LS
12:15-12:30	Elizabeth on Parade	LS
12:30-1:00	Religious Music	RC
1:00-1:05	Local News	LC
1:05-1:30	Carnival of Song	RC
1:30-2:00	Carnival of Song	RC
2:00-2:05	News and Weather	WS
2:05-2:30	Carnival of Song	RS
2:30-3:00	Carnival of Song	RC
3:00-3:05	News and Weather	WC
3:05-3:30	Carnival of Song	RS
3:30-4:00	Classroom Series	LS
4:00-4:05	News and Weather	WS
4:05-4:30	Carnival of Song	RC

4:30-4:45	Community Round Table	LC
4:45-5:00	Vespers	LS
5:00-5:05	News and Weather	WC
5:05-5:30	Supper Club	RC
5:30-6:00	Supper Club	RS
6:00	Sign Off	

[2960]

88. More detailed descriptions of some of the programs follow:

Community News. (Monday-Saturday, 6:15-6:30 A.M.) - This program will cover local school news, local happenings, news from the mayor's office, police department, and fire department. Anything significant of a local civic nature in and around the Elizabeth area would be covered on this program (e.g., Red Cross, Community Chest). There would be bulletins, as well, of local interest. Based on his experience with ABC and CBS, DeGray testified that the program's time segment would be a good time to reach most of the people in a city like Elizabeth.

Local News. This program, scheduled to be broadcast seven times throughout the day, Monday-Saturday (six broadcasts would be of five-minute duration and another would be of ten-minute duration) and three times on Sunday (each would be of five-minute duration), would — rather than being oriented toward civic news and events as would the Community News program — be oriented toward local factual events which were taking place or had recently transpired such as local accidents.

"Coffee Go Round". (Monday-Saturday, 7:05-7:15 A.M.) - This is a program to be conducted by women and concerned mainly with women, dealing with such things as fashions, household hints and shopping guides.

"Sports Preview". (Monday-Saturday, 9:05-9:15 A.M.) - This will be an all encompassing preview of sports events. DeGray testified that Elizabeth is a sports conscious community, where there is a healthy department of recreation and a considerable number of sporting events. The intention here is to preview and discuss these sports, working with the Department of Health and Education in the town.

"Salute to Elizabeth". (Monday-Saturday, 9:15-9:30 A.M.) - The station would work with the local Chamber of Commerce on its various promotions, also the mayor's office, the city council, and the industrial commission, on programs relating to Elizabeth.

"Italian Hour". (Monday-Saturday, 9:30-10:00 A.M.) - This program is of interest to the Italian population in Elizabeth. Mayor Dunn testified that Elizabeth had a large Italian population.

[2961]

Classroom Series. (Monday-Saturday, 3:30-3:45 P.M.; Sunday, 3:30-4:00 P.M.) - This is a series to be produced with the superintendent of schools and coordinated with an audio-visual education program. This is a series of programs between the grade schools and high schools. Various recordings and plays will be included in this classroom series.

Talk. (Monday-Saturday, 4:05-4:15 P.M.) - This program would consist of conversations with community leaders in Elizabeth and adjacent areas.

"Sports Roundup". (Monday-Saturday, 4:15-4:30 P.M.) - This program would consist of recordings of sports events which already have occurred, both of a local and national nature.

"The Suburban Farmer". (Sunday, 11:30 A.M. - Noon) - This program would be coordinated with the Union Park Commission and is aimed at nature education and conservation.

"Local Schools Bulletin Board". (Sunday, 12:05-12:15 P.M.) -

This program is a bulletin board for local schools and will show what is happening in the local schools.

"Elizabeth on Parade". (Sunday, 12:15-12:30 P.M.) - This program would be a 15-minute interview program with prominent citizens in the area.

"Community Round Table". (Sunday, 4:30-4:45 P.M.) - This program would consist of forums and discussions with various business groups and government in the Elizabeth area on subjects of a community nature.

89. DeGray testified in detail respecting the proposed programming for the Elizabeth station. He testified that based upon his interviews and the telephone survey, coupled with his knowledge and familiarity with radio, he reached the conclusion in part that Radio Elizabeth's program schedule includes 14 hours of live programming per week which, as the witness understood it, is to be devoted to matters of local interest. His conclusion on this point reads as follows:

"The number of hours proposed for this purpose is adequate, if the station is well run to permit the station to establish the necessary local image and thus to permit it to operate successfully as an Elizabeth outlet."

[2962]

It was the opinion of this consultant that the programming proposed for the Elizabeth station would well meet the needs and requirements of Elizabeth as proposed for this 500 watt station. There is no evidence in the record that successfully refutes the testimony of DeGray.

Remand Issue (a)(4)

90. Turning now to remanded issue (a)(4), this applicant must show the extent to which the projected sources within its specified station location are adequate to support its proposal as compared with projected sources from all other areas. DeGray testified that the estimated first year revenue for the proposed station would be \$110,000. He also was of the opinion that all of the income would have to be from local revenues. This witness was of the opinion that the Elizabeth station with its low power would not be attractive as an advertising medium for advertisers seeking to reach the New York metropolitan area. He was of the further opinion that because of Elizabeth's size and retail sales the community could probably support more than one station. It was his experience that numerous cities throughout the country with less retail sales are supporting more than one radio station. While he had not reviewed Radio Elizabeth's proposed rate card it was the witness' opinion that the New York City and Newark stations are not an effective means of advertising for Elizabeth's merchants since the rate of these out-of-town stations is based on coverage in a metropolitan area which is of no interest to local business houses in Elizabeth. It was DeGray's belief that there is a profound need for local advertising by local businesses in Elizabeth and in Union County. On cross-examination DeGray conceded that he did not contact any Newark businessmen to ascertain if they would be interested in reaching the Elizabeth market. But, he did say that no sound radio operator with a 500-watt station in Elizabeth would attempt to compete with the larger area stations for regional and area advertising revenues. The gist of DeGray's testimony is that the \$110,000 projected figure would in all probability have to be realized from local revenues and he did not in his testimony contemplate any other sources of income.

However, a review of paragraphs 45, et seq., supra, discloses that Elizabeth, being the 130th largest city in the United States, ranks 138th in net effective buying income, and ranks 155th in total retail sales. The nine major banks in Elizabeth have total assets of 430 million dollars and the city is heavily industrialized and commercialized.

[2763]

Additionally, there are six retail centers in the city and many other neighborhood stores. The local daily newspaper in Elizabeth has a circulation of approximately 55,000. The record is void of any showing that Radio Elizabeth cannot meet its projected income from local sources with complete disregard for any national and regional advertising revenues.

Conclusions

1. This remand proceeding is somewhat unique in that it applies to only two of the three applicants herein, namely, Jupiter and Radio Elizabeth. The remand issues are predicated on the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (2 FCC 2d 190), released by the Commission on December 27, 1965, after both the Hearing Examiner and the Review Board had made their determinations in the matter.

2. The Commission, in its remand order, specified certain issues which are numbered (a)(1), (a)(2), (a)(3), (a)(4), and (b).

3. Taking up first remand issue (b). As heretofore set out in the Findings of Fact, it is abundantly clear because of lack of requisite signal strength that neither of these two applicants can comply with Sections 73.30, 73.31, and 73.188(b)(1) and (2) of the Commission Rules as it relates to New York City on one hand, and on the other, to Newark, New Jersey and New York City.

4. As to issue (a)(1), it is patently clear that the proposed station of Jupiter will be a Matawan, New Jersey, station, which will be the first AM station in that borough. Likewise, it is equally obvious that the proposed station of Radio Elizabeth will be an Elizabeth, New Jersey, station. The latter would be a first broadcast facility — either AM, FM, or TV in a city of 107,698 persons. The Matawan facility is not intended to serve New York City and, likewise, the Radio Elizabeth proposal is not designed to serve either New York City or Newark. Referring specifically to Newark, there is nothing in the record that indicates that the Elizabeth applicant desires to serve that city. Elizabeth and Newark are separate cities with different environments. The proposed transmitter is southwest of Elizabeth, while the city of Newark lies to the north and northeast of Elizabeth. The Commission said in

[2964]

Clay Broadcasters, Inc., 4 FCC 2d 932 (1966):

" * * * the Commission finds that, notwithstanding the proposed 5 mv/m penetration of Kansas City, the applicant has effectively demonstrated its intention to furnish a broadcast service for the city of Liberty and for Clay County, Mo., rather than Kansas City. The applicant's proposed power of 500 w appears reasonable in the light of its desire to furnish adequate service throughout Clay County, and that relatively lower power together with the proposed omnidirectional radiation pattern tends to rebut the interference that the applicant's real goal is to serve the larger community. Further, the applicant's proposed antenna location is not placed to the south of Liberty, where it would be closest to Kansas City, but to the southeast of Liberty, where county coverage would be maximized. Clay Broadcasters, Inc., has

demonstrated a need for a first local broadcast outlet for Liberty and Clay County, and has shown the existence of considerable local interest. Programming proposals submitted by the applicant indicate that its goal is to furnish a service directed to the interests of the people of Liberty and Clay County."

5. Turning now to remand issue (a)(2) it is apparent from the Findings of Fact that neither Matawan Borough nor Elizabeth are receiving particular attention pertaining to programming from any radio station as to the needs of these respective communities. While there is plenteous AM services to both Matawan and Elizabeth, it is crystal clear that there is no radio station, in each instance, that has its programming designed to meet the needs of either Matawan or Elizabeth. The Newark and New York stations that have been considered in this proceeding in no manner contemplate serving the specific needs of either Matawan or Elizabeth. Consequently, the conclusion is drawn that neither Matawan nor Elizabeth have service from standard broadcast stations that predicate their programming on the needs of either community.

[2965] J.
6. Respecting issue (a)(3) the programming that was designed for the Jupiter station was prepared under the direction of Dr. Frederick P. Stafflinger. He has been a resident of Matawan for over forty years and candidly testified that although he and his associates did not possess a certain amount of expertise relating to programming, they had prepared their programming originally based largely on their knowledge of the community. Stafflinger said that they had no "planned campaign" in ascertaining the programming for Matawan but that it was adopted largely upon the needs of the Mata-

wan community. The logic that Dr. Stafflinger presented based upon the record in this proceeding is well-founded and therefore, it is concluded that Jupiter has met the burden of proof on this issue.

7. Turning next again to remand issue (a)(3) when the application of Radio Elizabeth was filed, a program was proposed which is set out in detail in the Findings of Fact, paragraphs 86-89. Who the author of this programming was is not disclosed in the record. However, Radio Elizabeth employed a consultant who, among other things, was to explore its programming. This consultant was Edward J. DeGray who had been in the industry for some 30 years. DeGray has had a wide and varied experience in the field of radio broadcasting, having been associated with both the American Broadcasting Company and Columbia Broadcasting System. He was employed to come to Elizabeth in early 1966 and to determine the adequacy of the radio service presently available to the community of Elizabeth; the type of station which Radio Elizabeth's proposal would represent from an economic and service standpoint; the type of radio service which is needed by the Elizabeth community, and whether this service would be provided as a result of the grant of the Radio Elizabeth application. There is no question but what DeGray's experience well qualified him to determine the needs respecting programming and financing of the Radio Elizabeth proposal. DeGray personally interviewed 47 civic, business, religious, and political leaders of the Elizabeth community, the names of which are herein set out in the Appendix. Additionally, he conducted a detailed telephone survey where individuals were selected at random to ascertain if the programming that had been proposed in the original application met the needs of the Radio Elizabeth proposal. The determinations made by DeGray that the proposed programming would meet the needs of the large Elizabeth community have not been successfully rebutted by either Jupi-

ter or Somerset. As a matter of fact, the competency of DeGray to make a determination relative to the adequacy of the programming by Radio Elizabeth has hardly been remotely challenged by either of the other two applicants. The testimony of DeGray corroborates the fact that the Radio Elizabeth programming is oriented towards this large city.

[2966]

8. The last issue for determination relates to issue (a)(4) and that goes to the question of adequate revenues for the first year of operation of both proposals. As it concerns Radio Elizabeth, this applicant had anticipated that its first year revenues, primarily local in nature, would total \$110,000. DeGray testified that in his opinion the \$110,000 figure was a conservative estimate. He stated that because of Elizabeth's size and retail sales the community could probably support more than one standard broadcast station. Based on his experience, he added that throughout the country there were numerous cities supporting one standard broadcast station with less retail sales than the city of Elizabeth. He was of the opinion because of its low power that the Elizabeth proposal would not be attractive as an advertising medium for advertisers from New York. DeGray also held the view that there was a distinct need for local advertising by local businesses in Elizabeth. In the estimate of \$110,000, no consideration is given to the possibility of any national or regional advertising sales, as the prime figure is based solely on local revenues. n/a

9. As it relates to issue (a)(4), the Jupiter position is not quite clear. In the original application filed in 1960, the first year revenues were projected at \$90,000. However, in 1966 in an exhibit tendered, this applicant reflected first year revenues at \$75,000, while on the other hand, a witness for Jupiter at the evidentiary hearing

placed the first year income at \$150,000. Although there is some confusion in the record as to what the exact amount of first year revenues at Matawan would be, it is realized that the sponsors of the Matawan station were somewhat amateurish in their efforts, but they are regarded by the Hearing Examiner as substantial citizens, endeavoring to bring to their community its first local broadcast station. Although there may be some question as to whether Jupiter has fully sustained its burden of proof under issue (a)(4), the conclusion is here made that this Matawan station may most certainly finance its first year's operation with adequate funds from local sources.

10. The conclusion is that both applicants, namely, Jupiter and Radio Elizabeth, have met the suburban issue as enunciated by the Commission in its policy statement (2 FCC 2d 190), of December 27, 1965.

[2967]

11. The conclusion is further reached here in consideration of all the factors that have been developed in this proceeding, that the preponderance of evidence points to the fact that the grant of the application herein should be made to Radio Elizabeth which seeks to bring to one of the largest cities in the United States its first broadcast facility, as against the first service to the small borough of Matawan, New Jersey, with population of 5,097, or the the city of Somerville, New Jersey, with its 12,458 persons. The latter city is the site of the Somerset proposal.

12. In view of the foregoing Findings of Fact and Conclusions of Law, and upon consideration of the entire record in this proceeding, it is concluded that a grant of the application of Radio Elizabeth, Inc., for a construction permit for a new Class II standard broad-

cast station to operate on 1530 kilocycles, with power of 500 watts, daytime only, at Elizabeth, New Jersey, would serve the public interest, convenience and necessity, conditioned upon the following:

1. Permittee shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation [Media Enterprises, Inc.], licensee of WFYI, for increased power as requested in BP-14328.
2. Pending a final decision in Docket No. 14419, with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

Accordingly, IT IS ORDERED, that unless an appeal to the Commission from this Supplemental Initial Decision is taken by the parties or the Commission reviews the Supplemental Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Radio Elizabeth, Inc., for a construction permit for a new standard broadcast station to operate on 1530 kilocycles, 500 watts, day, Class II, at Elizabeth, New Jersey, IS GRANTED; and the application of Jupiter Associates, Inc., for a construction permit for a new standard broadcast station to operate on 1530 Kilocycles, 500 watts, day, Class II, utilizing a directional antenna, at Matawan, New Jersey, and the application of

[2968]

William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company, for a construction permit for a new standard broadcast station to operate on 1530 kilocycles, 1 kilowatt, day, Class II, employing a directional antenna, at Somerville, New Jersey,

ARE DENIED, and the Initial Decision released December 10, 1963, IS AFFIRMED, conditioned upon the following:

1. Permittee shall accept any interference received in the event of a subsequent grant of the proposal of VIP Broadcasting Corporation [Media Enterprises, Inc.], licensee of WFYI, for increased power as requested in BP-14328.
2. Pending a final decision in Docket No. 14419, with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 3.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

/s/ Jay A. Kyle
Hearing Examiner
Federal Communications Commission

[2969]

Appendix

The following is a list of the persons personally contacted by Edward J. DeGray, including their positions, years of residency in the Elizabeth area, and the date of the interview.

<u>Name</u>	<u>Position</u>	<u>Years Resident in Eliza- beth Area</u>	<u>Date</u>
Thomas G. Dunn	Mayor of Elizabeth	45	3-8-66
B. Peter Gold	Member, Board of Education Partner, B. Peter Gold & Co.	60	3-10-66
Joseph Simon	Part Owner of Academy Clothiers	40	3-14-66
John J. McGoochan	Director, Health, Welfare & Housing	30	3-10-66

Charle T. Shallcross	Director of Physical Welfare	55	3-10-66
John E. Dwyer	Superintendent of Schools	35	3-10-66
Joseph Walker	Director-Superintendent of Recreation	56	3-10-66
John H. Graichen	Executive Director, City of Elizabeth Re-development Agency	50	3-10-66
Sylvan Zipper	Executive Secretary Industrial Commission	53	3-10-66
Frank Begg	Manager, New Jersey State Employment Agency for Eastern Union County	30	3-14-66
Elizabeth Beglen	Executive Director YWCA for 5 townships	39	3-14-66

[2970]

<u>Name</u>	<u>Position</u>	<u>Years Resident in Elizabeth Area</u>	<u>Date</u>
Rubin Natelson	Member of Parking Commission, Part Owner Natelson Clothing Store, Past Pres. Elizabeth Retail Merchants Assoc.	over 50	3-14-66
Sister Ellen Patricia	Administrator, St. Elizabeth Hospital	12	3-14-66
Monsignor Thomas J. Donnelly	Paster, Immaculate Conception Church	10	3-14-66
Alex Sladkus	Part Owner of Shoe Store & Promotion Director of Elizabeth Retail Merchants Assoc.	35	3-15-66

Charles H. Armstrong	Vice Pres. R. J. Goerke Dept. Store	9	3-15-66
Mrs. Hazel Elks	Library Director	25	3-15-66
John F. Waln	Undersheriff of County	58	3-15-66
Roland T. Chard	Vice Pres., National State Bank	50	3-15-66
(Rabbi) Dr. Gerson B. Chertoff	Temple B'nai Israel	20	3-15-66
Paul Novello	Coordinator, Visual Education for the Elizabeth Schools	52	3-10-66
Rolland Delfausse	Executive Director of Greater Elizabeth Movement	25	3-10-66
William Runyon	Postmaster	68	3-10-66
John Noonam	Assistant Postmaster	56	3-10-66

[2971]

<u>Name</u>	<u>Position</u>	<u>Years Resident in Eliza- beth Area</u>	<u>Date</u>
Frank Cuchie	Director of County Board of Freeholders (21 municipalities)	43	3-10-66
Lawrence Gale	Part Owner of Solomon's Wholesale Distributors	51	3-14-66
Joseph Fedrico	General Manager of Elizabeth Portside Industrial Center and Okin Palin Construc- tion Corp.	5	3-14-66
Will Lorch	Banquet Manager of the Elizabeth Carteret Hotel	37	3-14-66

John Levy	Recent President Elizabeth Retail Merchants Assoc. & Vice Pres. of Levy Brothers	30	3-14-66
Howard Glenn	Owner of Ritz Bros. Drug Chain, Past. Pres. Retail Merchants Assoc.	16	3-14-66
John R. Karel, M.D.	Deputy Coordinator Civilian Defense & Disaster Control Union County	20	3-15-66
Reverend Guy Lanbert, Jr.	Senior Pastor - Third Presbyterian Church	1	3-15-66
S. T. Lifer	For Past 2 Years Pres. Elizabeth Retail Merchants Assoc., Pres. of Rogers Clothes	50	3-15-66
Budd C. Kessner	Pres. & Owner of Monarch Chrysler, Plymouth, Inc., & Member of the Board of Governors of John Runnells Hospital	50	3-15-66

[2972]

<u>Name</u>	<u>Position</u>	<u>Years Resident in Elizabeth Area</u>	<u>Date</u>
Joseph Cillrzak	(One of the Founders) Trustee of Elizabeth Little League, Sanitary Inspector	45	3-15-66
Abner West	Principal, Thomas Jefferson High School	20	3-16-66
Everett Sherbourne	President, City Federal Savings & Loan	26	3-16-66
Robert Luse	Vice Principal of Battin High School	35	3-16-66

Edward F. Deignan	Director, Fire Dept., Former Pres. of Inter- national Assoc. of Fire Chiefs	58	3-16-66
Hubert Barbour	Executive Director Elizabeth Human Rela- tions Commission	3	3-16-66
Edward L. Fox	Executive V. P. Cham- ber of Commerce, Eastern Union County	42	3-21-66
Joe A. Juncker	Scout Director of Union Council - Boy Scouts of America (12 towns)	3	3-21-66
Frank Moore	President, Moore Chevrolet	41	3-21-66
J. Warren Russell	Vice President - Sales Elizabeth Town Consoli- dated Gas Co.	7	3-21-66
Marinus T. Easton	General Secretary, YMCA of Eastern Union County	10	3-21-66
Michael D. Roy	Chief of Police - Eliza- beth	45	3-21-66
John E. High- smith, Jr.	Executive Director Community Action for Economic Opportunity	40	3-21-66

[3019]

SUPPLEMENTAL DECISION

Adopted March 29, 1968: Released April 5, 1968

By the Review Board: Pincock, Slone, and Kessler.

1. The applicants herein seek authority to construct a new Class II standard broadcast station to operate daytime only on the frequency 1530 kHz. Each would locate its station in New Jersey — Jupiter Associates, Inc. (Jupiter) at Matawan; Somerset County Broadcasting Company (Somerset) at Somerville; and Radio Elizabeth, Inc. (Radio) at Elizabeth.

2. The proceeding is now before the Board following a remand of our earlier Decision (38 FCC 321, 4 RR 2d 354) which affirmed the Initial Decision of Hearing Examiner Jay A. Kyle¹ and granted Radio's application on the basis of Section 307(b) considerations. The remand resulted from the Commission's adoption of the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities,² which provides that if an applicant's proposed 5 mv/m daytime

¹FCC 63D-140, 38 FCC 339.

²2 FCC 2d 190, 6 RR 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 RR 2d 1908 (1966).

[3020]

contour would penetrate the geographic boundaries of a nearby larger city having a population exceeding 50,000 and more than twice as great as that of the designated community, such proposal will be presumed to be one for the larger central city. Inasmuch as both Jupiter and Radio would provide 5 mv/m daytime service to a portion of New York City and further that Radio would provide similar service to Newark, New Jersey, the Commission remanded the proceeding on issues:³

(a) To determine whether each of the proposals of Jupiter Associates, Inc., and Radio Elizabeth, Inc. will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which each specified station location has been ascertained by

³2 FCC 2d 203, 6 RR 2d 578 (1965).

each of the two applicants to have separate and distinct programming needs;

- (2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;
- (3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and
- (4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

3. On July 31, 1967, Examiner Kyle released a Supplemental Initial Decision (FCC 67D-37) in which he concluded that both Jupiter and Radio successfully rebutted the presumption that their proposals are for communities other than the specified station locations. Accordingly,

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having also concluded that the preponderance of evidence, as fully developed in this proceeding, continues to point to a grant of Radio's application on standard Section 307(b) grounds, the Examiner affirmed his original Initial Decision. The proceeding is now be-

fore the Board on exceptions filed by Jupiter and Somerset.⁴ We have reviewed the Supplemental Initial Decision in light of these exceptions and the oral arguments presented before a panel of the Board on February 27, 1968. For the reasons hereinafter stated, we concur with the Examiner's recommendation that Radio's application be granted and such findings of fact and conclusions of the Supplemental Initial Decision, as are not inconsistent with this Decision of the rulings on exceptions contained in the attached Appendix, are hereby adopted.

4. Radio proposes to operate nondirectionally with power of 500 watts from a site in Linden, New Jersey. Linden is contiguous to and southwest of Elizabeth. Newark is also contiguous to Elizabeth but it lies to the north of Elizabeth. None of the parties hereto have challenged Radio's contention that no directional operation could be shaped so as to provide the required signal strengths to Elizabeth and still not penetrate Newark and New York City with a 5 mv/m signal. Its 25 mv/m contour would not extend to the political boundaries of either of the latter two cities. Thus, at the outset it must be observed that from an engineering standpoint, Radio's proposal is consistent with its expressed intention to provide Elizabeth with its first local transmission service.⁵ See Clay Broadcasters, Inc., 4 FCC 2d 932, 8 RR 2d 687 (1966); Du Page County Broadcasting Inc., 5 FCC 2d 557, 8 RR 2d 930 (1966).

5. The demographic and community survey evidence, together with the testimony of Elizabeth's Mayor Thomas G. Dunn and former

⁴The Broadcast Bureau supports the Supplemental Initial Decision and neither the Bureau nor Radio has filed any exceptions thereto.

⁵Although Elizabeth ranks as the 130th largest city in the United States, it does not have an AM, FM or TV station.

Mayor Steven J. Bercik, establish clearly that Elizabeth is one of the nation's major cities and that it has programming needs which are separate and distinct from either Newark or New York. These needs are traceable to the size of the city (107,698 persons), its industrialized nature, the different characteristics of its population, and its prominence as the trading center and seat of Union County (504,255 persons). For example, in the area of law enforcement and public safety,⁶ the need was shown for a local communications outlet to aid in crime prevention and detection; assist in curbing unfounded, tension building rumors; provide quick, accurate information regarding emergencies which might develop in Elizabeth; and coordinate county-wide civil defense programs which emanate from

⁶ Elizabeth's police department has 240 policemen, 11 civilian administrators and 59 school crossing guards. Its fire department has 273 members and approximately 30 pieces of equipment.

[3022]

Elizabeth. Interviews with leaders of the municipal government and various civic organizations⁷ revealed the need for informing citizens about local programs dealing with health, education, recreation, urban redevelopment and industrial relations.⁸ According to Mayor Dunn, a transmission service is needed in Elizabeth to assist in overcoming the breakdown in local communications with large segments

⁷ For a list of those community leaders interviewed by Radio, see Appendix to the Supplemental Initial Decision.

⁸ Elizabeth has its own Housing Authority, Redevelopment Agency, Local Assistance Board, Human Relations Council, Civil Defense Council, and Industrial Commission. Its labor force exceeds its population by more than 30,000 persons.

of the population. The need for an effective local advertising medium is underscored by the fact that, although nationally Elizabeth ranks 138th in net effective buying income, and 155th in total retail sales, its only local advertising outlet is the Elizabeth Daily Journal.

6. The record evidence also demonstrates that the non-Newark stations which provide a 2 mv/m or greater signal to Elizabeth do not program for the specific needs and interests of Elizabeth. Rather, it must be concluded that they broadcast matters relating to Elizabeth only when such matters are considered of interest and significance to their entire service areas.⁹ Similarly, the testimony of representatives of the three Newark stations providing primary daytime service to Elizabeth reveals that although these stations place a somewhat greater emphasis on Elizabeth (than the stations located elsewhere), their programming is inadequate in terms of meeting the separate and distinct needs and interests of that city in any significant manner. WVNJ considers itself a regional station. It serves approximately 50 communities and its programming is not specifically directed toward Elizabeth. As stated by the licensee's president, Edward Scudder, Jr., "we are serving some 50 communities of which Elizabeth is one. We serve it and concentrate [on it] as much as on any other." (Tr. 1628.) WVNJ obtains its news about Elizabeth through the facilities of UPI, whose employee assigned to the Newark-Elizabeth area puts "stories of importance" on the wire service. (Tr. 1620.) WVNJ's parent organization, the Newark News, has an office in Elizabeth and occasionally the station gets a story from this office, "but not frequently." (Tr. 1620.) WJRZ's represen-

⁹ The percentage of current local news these stations devote to local news of Elizabeth is minimal. The highest percentage was given by Station WNEW in New York City, whose representative stated "... although it is extremely difficult to approximate a percentage ... the figure might approximate five percent."

tative, Harry Reith, testified that approximately 15-20% of the station's local news programming is devoted to Elizabeth. However, this figure includes public service announcements made on behalf of Elizabeth organizations. The station has two reporters assigned to cover stories which might develop in the five-county area assigned to them. In Reith's

[3023]

words, "[T]hey go into the field as the news story seems to warrant or as it develops." (Tr. 1633). During the seven days immediately preceding receipt of Radio's interrogatories, WJRZ broadcast approximately 200 public service announcements, only one of which was on behalf of an Elizabeth organization.¹⁰ The third Newark station, WNJR has broadcast some programs directed toward Elizabeth. According to its representative, Tim H. Crow, on 14 occasions between June 24, and September 16, 1966, various representatives of Elizabeth's municipal government and civic organizations appeared on news programs carried by WNJR. However, excluding sport scores and PSA's broadcast on behalf of Elizabeth organizations,¹¹ 1% or less of WNJR's local news is devoted to events in Elizabeth. (Tr. 1610-1611).

7. The Board is also of the view that the record evidence compels conclusions favorable to Radio under remand issues a(3) and a(4). Radio proposes to devote approximately 14 hours per week to

¹⁰ Mr. Reith stated that based on his awareness of past operations, the 200 to 1 ratio was not representative and that probably more Elizabeth PSA's were broadcast per week.

¹¹ According to Mr. Crow, WNJR maintains bi-weekly contacts with local organizations, and the number of PSA's broadcast each week on behalf of Elizabeth organizations ranges between 10 and 50 (Tr. 1593, 1615).

N/A

local live programs. Its schedule will include discussion of community events, local news, sports, educational programs on behalf of Elizabeth's schools,¹² and public affairs programs dealing with topics relating specifically to Elizabeth.¹³ With regard to the adequacy of local sources of revenues, Radio's consultant, Edward J. DeGray, concluded that Elizabeth can financially support at least one standard broadcast station. DeGray premised his conclusion upon the size of and economic data relating to Elizabeth, and his personal interviews with local businessmen. These businessmen expressed the view that because an Elizabeth merchant would have to pay the Newark and New York stations for coverage which is of no interest to him, these existing stations could not be considered attractive or effective advertising outlets for local businesses. Although Radio did not furnish a breakdown of its \$110,000 first year revenue estimate, DeGray testified that because of the technical characteristics of its proposal, and in particular its low power,¹⁴ Radio would have to devote its entire efforts to developing the local market and would have to depend almost exclusively upon advertising revenues from that market. While we agree with the contention that Mr.

¹² Elizabeth has 3 senior high schools, 5 junior high schools and 19 elementary schools. In addition, there are an aggregate of 23 parochial, Jewish and private schools.

¹³ See paragraphs 87 and 88 of the Examiner's findings.

¹⁴ In contrast to the 500 watt daytime only proposal of Radio, the three Newark stations presently operate or are authorized to operate with 5 kw; eight of the New York stations have 50 kw and five have 5 kw facilities.

DeGray could not testify as to the extent to which Radio intends to rely upon local sources, his qualifications, experience in the broadcast industry and analysis of the question persuade the Board that Radio will be required to rely largely upon local sources of revenues.

8. In sum, we concur with the conclusion reached by the Examiner in his Supplemental Initial Decision — namely, that Radio has successfully rebutted the presumption that it is an applicant for some larger city, and has demonstrated, pursuant to remand issues a(1) to a(4), that it realistically intends to, and would in fact be, a local transmission service for Elizabeth, New Jersey. We have also evaluated the evidence adduced during the remand proceeding in conjunction with that adduced during the original hearing pursuant to the standard Section 307(b) issue and find no valid reason to depart from our earlier determination that Elizabeth's need for a first local outlet for self-expression is greater than that of Matawan¹⁵ or Somerville and that a grant of Radio's application would best serve the public interest, convenience and necessity.

9. Certain of the parties hereto have raised questions with regard to footnote 6 of our earlier Decision. Without passing on the merits of the various contentions, the Board is of the view that since the matters set forth in the footnote are of no decisional significance

¹⁵ Although we have adopted those findings and conclusions of the Supplemental Initial Decision which are not inconsistent with this Decision or the rulings set forth in the attached Appendix, we wish to specifically express our concurrence with the Examiner's determination that Jupiter has successfully rebutted the presumption that it is an applicant for New York City. In this connection see Jersey Cape Broadcasting Corp. (WCMC), 2 FCC 2d 942, 7 RR 2d 540 (1966).

and no reliance has been placed thereon, such footnote will be deleted.

10. ACCORDINGLY, IT IS ORDERED, That the Review Board's Decision herein (38 FCC 321, 4 RR 2d 354) released January 25, 1965, IS AFFIRMED, as modified by the deletion of footnote 6 thereof.

11. IT IS FURTHER ORDERED, That the application of Radio Elizabeth, Inc. (BP-14812) for a permit to construct a new standard broadcast station to operate on the frequency 1530 kHz, with power of 500 watts, daytime only, Class II, at Elizabeth, New Jersey, IS GRANTED, subject to the condition set forth below; and that the mutually exclusive applications of Jupiter Associates, Inc. (BP-14178) and William S. Halpern and Louis N. Seltzer, d/b as Somerset County Broadcasting Company (BP-14234) ARE DENIED:

- I. Any pre-sunrise operation must conform with Sections 73.87 and 73.99 of the Rules, as amended June 28, 1967 (32 FR 10437), supplementary proceedings (if any) involving Docket No. 14419, and/or the final resolution of matters at issue in Docket No. 17562.

/s/ Dee W. Pincock
Member, Review Board
Federal Communications Commission

Attachment

APPENDIX

Rulings on Exceptions to Supplemental Initial Decision

Exceptions of William S. Halpern and
Louis N. Seltzer, d/b as Somerset
County Broadcasting Company

<u>Exception No.</u>	<u>Ruling</u>
1	<u>Denied.</u> The data underlying Radio's Exhibit 100-1, Appendix C, were made available to counsel for all parties prior to the time DeGray testified (Tr. 1479-80) and all parties were accorded ample opportunity to cross-examine DeGray on the basis of such data.
2	<u>Granted</u> to the extent that Radio's Exhibits 200-1 through 200-48 were improperly admitted into evidence; such exhibits have been disregarded by the Board in reaching its Decision herein. <u>Denied</u> in all other respects. These exhibits constitute the data underlying Radio's Exhibit 100-1, Appendix C, and as noted above, they were made available to all parties to test the admissibility of and weight to be given that exhibit. The Examiner erred only in admitting the underlying data (Exhibits 200-1 through 200-48) into evidence without first recalling the sponsoring witness who was excused before these particular exhibits were offered into evidence. However, the fact that these exhibits should not have been admitted does not affect the admissibility of Radio's Exhibit 100-1, Appendix C. It has long been recognized that subject to appropriate safeguards by way of cross-examination and rebuttal evidence, summary tabulations are admissible in administrative proceedings without the need for also introducing the underlying data in evidence. See <u>Willapoint Oysters, Inc. v. Ewing</u> , 174 F. 2d 676 (9th Cir. 1949).
3	<u>Denied.</u> The data underlying the telephone survey which is summarized in Appendix D to Radio's Exhibit 100-1 were made available to all

parties prior to the time DeGray testified. See our rulings on Somerset's Exceptions 1 and 2. There is no basis for concluding that the summarization is not properly representative of the underlying data.

4, 5

Denied. Somerset's interpretation of the Board's ruling (FCC 66R-497, 6 FCC 2d 13, released December 16, 1966) is incorrect. Remand issue a(2) calls for the adduction of evidence as to the programming of all stations providing primary service to Elizabeth and Matawan. Counsel for Somerset was present at the depositions and had the opportunity to cross-examine the witnesses. Under the circumstances it can not claim prejudice to its rights in this proceeding.

[3027]

Exception No.Ruling

6

Denied. Prior to the taking of depositions, the parties agreed that persons other than those who answered the interrogatories could be deposed provided they were otherwise qualified to have answered the interrogatories in the first instance. Somerset does not now contend that the deponent in Radio's Exhibit 300-7 was not qualified but only that it did not receive advance notice of this one particular substitution. However, all of Somerset's procedural rights were safeguarded and no prejudice resulted from the substitution. See rulings on Somerset's Exceptions 4 and 5. With regard to Radio's Exhibit 100-5, it is sufficient to note that if during cross-examination a witness qualifies an answer given during direct testimony, such qualification does not require deletion of the original answer.

7

Denied. The number of broadcast services available to "presumed community" is relevant to the remand issues. See Boardman Broadcasting Company, Inc., 10 FCC 2d 442, 11 RR 2d 566 (1967).

- 8 Denied. The signal strengths of the Newark and New York City stations are particularly relevant to remand issue a(4). See paragraph 7 and footnote 14 of this Decision.
- 9 Denied. The Examiner's findings are supported by the record. See paragraph 4 of this Decision.
- 10 Denied. The Examiner's findings are supported by the record.
- 11, 21, 28 Denied. The Examiner's findings describing the characteristics of Elizabeth and Matawan (and the presumed City of Newark) are relevant to a determination of whether those communities have separate and distinct programming needs. This determination, in turn, is relevant to the question of whether each of the applicants will realistically provide a local transmission facility for its specification station location.
- 12 Denied in substance. There is no basis for concluding that those changes which might have taken place in the proposed station location necessitated a change in Jupiter's program proposal.
- 13 Denied. The Examiner's findings (Supplemental Initial Decision, paragraph 60) are adequate and accurately reflect the record.

[3028]

Exception No.Ruling

- 14 Denied. Jupiter has established that Matawan has programming needs separate and distinct from New York City. The Examiner's findings (Supplemental Initial Decision, paragraph 61) are supported by the record.
- 15 Denied. Remand issue a(4) does not require an applicant to obtain specific commitments for the purchase of broadcast time from prospective local advertisers.

- 16 Granted to the extent that the Examiner's assumption that since Jupiter's station would be the first in the borough, it may be adequately financed for the first year, is unfounded. However, Jupiter's failure to show the extent to which the projected sources of revenues from Matawan are adequate to support its proposal when compared with projected sources from all other areas is not determinative of the question as to whether Jupiter has rebutted the presumption. Policy Statement, 2 FCC 2d at 193.
- 17 Denied in substance. Although evidence that New York City stations were not requested by Elizabeth residents to broadcast programs of the type referred to in paragraph 65 of the Supplemental Initial Decision cannot be considered irrelevant to an evaluation of the existing unfulfilled needs of Elizabeth, its probative value is diminished substantially by record evidence indicating that no more than 18.3% of the 153 persons responding to Radio's telephone survey regularly listened to any one of the existing stations providing a reception service to Elizabeth.
- 18 Denied. Editorial programs "on matters of interest to residents of Northern New Jersey" can not be considered as evidence of programming directed toward the specific needs of Elizabeth.
- 19 Denied in substance. See our rulings on Exceptions 17 and 18. See also paragraph 6 of this Decision.
- 20 Denied. The Examiner's finding that Radio rebutted the presumption that it was an applicant for New York City is supported by the record.
- 22 Denied. The Examiner's findings (Supplemental Initial Decision, paragraph 68) are supported by the record.

[3029]

<u>Exception No.</u>	<u>Ruling</u>
23	<u>Denied in substance.</u> Although Mayor Dunn estimated that he had appeared on the four New Jersey stations about 25 times, these appearances were not limited to his term as Mayor but covered the last 10 years; moreover, these appearances were not all directed toward Elizabeth but rather for wider coverage in connection with his state-wide political activities (Tr. 1374-75).
24, 26	<u>Denied in substance.</u> The Examiner's findings adequately reflect the record and the additional requested findings would be of no decisional consequence.
25	<u>Granted in substance.</u> The record indicates that DeGray had no experience in the technique of random sampling. However, the procedure used by DeGray in the selection of names for the telephone survey is clearly set forth in Attachment A to Radio's Exhibit 100-1, Appendix D. We have evaluated the exhibit on that basis.
27, 29	<u>Denied.</u> See ruling on Somerset's Exception 3.
30	<u>Denied.</u> The Examiner's finding is supported by the record. See paragraph 6 of this Decision.
31	<u>Denied in substance.</u> WVNJ's representative testified testified that of the 219 public service agencies and organizations it surveyed in January 1966, only 22 were in Elizabeth. He also testified that approximately 20% of the station's news is devoted to local news; that such local news may include Elizabeth; but that he was unable to state what percentage of the local news pertains to Elizabeth. See also paragraph 6 of this Decision.
32	<u>Granted in substance.</u> See paragraph 6 and footnote 11 of this Decision.
33	<u>Granted to the extent</u> indicated in footnote 10 of this Decision.

- 34 Denied in substance. The record evidence reveals that DeGray did in fact discuss Radio's proposed local live programming with one of Radio's principals, and that DeGray was quite familiar with the scope and intent of that programming. On the basis of his knowledge of the proposed local live programming, the community leader survey and the telephone survey, DeGray testified that the program proposal is adequate to establish the necessary local image and to operate successfully as an Elizabeth outlet.

[3030]

<u>Exception No.</u>	<u>Ruling</u>
35	<u>Denied in substance.</u> See paragraph 7 of this Decision.
36	<u>Denied.</u> The Examiner's conclusions are supported by the record. The use of the term "applicants" in the remand issues is to denote the party having the burden of proof thereunder. It cannot be interpreted as requiring the principals of an applicant to <u>personally</u> conduct surveys, etc.
37	<u>Denied.</u> The Examiner's conclusions are supported by the record. See paragraph 6 of this Decision.
38	<u>Denied.</u> The Examiner's conclusion is supported by the record.
39	<u>Denied.</u> The Examiner's determination that DeGray was qualified and competent to conduct meaningful programming surveys is supported by the record.
40	<u>Denied.</u> See paragraph 7 of this Decision.
41	<u>Granted in substance.</u> See ruling on Somerset's Exception 16.
42	<u>Denied</u> for the reasons stated in the whole of this Decision.

43

Denied for the reasons stated in the whole of this Decision and our earlier Decision (38 FCC 321, 4 RR 2d 354) which we have affirmed herein.

[3031]

Exceptions of Jupiter Associates, Inc.

<u>Exception No.</u>	<u>Ruling</u>
1, 36, 39	<u>Denied</u> as being without decisional significance under the remand issue herein. The Examiner's findings based on Matawan Borough alone support his conclusion that Jupiter has rebutted the presumption that it is an applicant for New York City.
2	<u>Denied</u> . The record citation does not support the requested finding.
3	<u>Denied in substance</u> . The Examiner's findings are adequate and are supported by the record. The additional requested findings would be of no decisional consequence.
5-8, 10, 11	<u>Denied in substance</u> . The Examiner's findings are adequate and are supported by the record. The additional requested findings would be of no decisional consequence. See also ruling on Jupiter's Exception 1.
4	<u>Denied</u> . The substance of the requested finding is set forth in paragraphs 11 and 28 of the Supplemental Initial Decision.
9	<u>Denied</u> . The requested finding was made by the Examiner. See paragraph 76 of the Supplemental Initial Decision.
12	<u>Denied</u> . The Examiner's finding that "no extensive efforts were made by the applicant's stockholders to ascertain specifically the needs of the community" is supported by the record. The additional findings requested in Jupiter's Exception 11 would not alter that determination.

- 13 Granted in substance. Maghan's testimony indicates that Jupiter based its revenue estimates on local sources only. However, as to its overall showing under remand issue a(4), see our ruling on Somerset's Exception 16.
- 14 Granted in substance. The Board has taken into account the increase in sales experienced by business establishments in Matawan Borough between 1958 and 1963.
- 15, 16 Denied in substance. See paragraph 6 of this Decision and rulings on Somerset's Exceptions 17 and 18. The additional findings requested in Exception 15 reinforce our view that the non-Newark stations broadcast matters relating to Elizabeth only when such matters are considered of interest and significance to their entire service areas.
- 17 Denied in substance. The Examiner's findings are adequate and are supported by the record. The additional requested finding would be of no decisional consequence.

[3032]

<u>Exception No.</u>	<u>Ruling</u>
18	<u>Denied.</u> The subject finding is relevant to an evaluation of DeGray's qualifications.
19	<u>Denied</u> as being without decisional significance under the remand issue herein.
20	<u>Denied in substance.</u> See ruling on Somerset's Exception 34.
21	<u>Denied.</u> The results of the telephone survey are set forth in Appendix D to Radio's Exhibit 100-1 which was properly admitted into evidence. The Examiner was not required to summarize the Exhibit in his findings of fact. See rulings on Somerset's Exceptions 2 and 3.
22, 23	<u>Denied.</u> The subject findings are relevant to the remand issues. See also our ruling on Somerset's Exception 36.

- 24 Denied in substance. See paragraph 6 of this Decision. See also ruling on Somerset's Exception 31.
- 25 Granted in substance. See paragraph 6 and footnote 11 of this Decision.
- 26 Denied. The Examiner's findings are adequate and are supported by the record. See also paragraph 6 and footnote 10 of this Decision.
- 27 Denied. The fact that DeGray did not participate in the preparation of Radio's program proposal does not render his descriptions and evaluation of the local live programming irrelevant. See ruling on Somerset's Exception 34.
- 28 Denied in substance. See paragraph 7 of this Decision.
- 29-31 Denied. The Examiner's conclusion is supported by the record. See paragraph 6 of this Decision.
- 32 Denied. See ruling on Somerset's Exception 36.
- 33 Denied. See ruling on Somerset's Exceptions 34 and 36; and Jupiter's Exception 27.
- 34 Denied. The Examiner's conclusion is supported by the record. See paragraph 7 of this Decision and ruling on Jupiter's Exception 28.
- 35, 37 Denied for the reasons stated in the whole of this Decision and our earlier Decision (38 FCC 321, 4 RR 2d 354) which we have affirmed herein.
- 38 Denied. See rulings on Jupiter's Exceptions 27, 32-34, and Somerset's Exceptions 34 and 36.
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[3100]

ORDER

Adopted June 19, 1968; Released June 20, 1968

By the Commission: Commissioner Cox not participating;
Commissioner Johnson absent.

1. The Commission has under consideration: (a) the Supplemental Decision, FCC 68R-141, 12 FCC 2d 217, released by the Review Board on April 5, 1968; (b) the application for review, filed May 6, 1968, by Jupiter Associates, Inc., and oppositions, filed May 17, 1968, by the Chief, Broadcast Bureau, and May 21, 1968, by Radio Elizabeth, Inc.; and (c) the application for review, filed May 6, 1968, by Somerset County Broadcasting Company, oppositions, filed May 17, 1968, by the Chief, Broadcast Bureau, and May 21, 1968, by Radio Elizabeth, Inc., and a reply filed June 4, 1968, by Somerset County Broadcasting Company.

2. ACCORDINGLY, IT IS ORDERED, That the application for review, filed May 6, 1968, by Jupiter Associates, Inc., and the application for review, filed May 6, 1968, by Somerset County Broadcasting Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

JOSEPH STENGER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. HENNESSEY: Let the record show I am handing to the reporter two copies of a two-page document which has been marked for identification as the Jupiter Exhibit No. 20.

BY MR. HENNESSEY:

Q. Would you state your name, please? A. Joseph Stenger.

Q. Where do you live? A. Coltsneck, New Jersey.

Q. How long have you lived there? A. Six months.

MR. COLL: I am sorry, but I missed that name.

THE WITNESS: Coltsneck, New Jersey.

BY MR. HENNESSEY:

Q. Where did you live before that? A. Route 34, Matawan.

Q. And how long did you live there? A. Twenty-three years.

Q. Where are you employed? A. The Farmers' and Merchants' Bank, Matawan.

Q. When you lived in Matawan, did you hold any position of civic responsibility? A. Yes, I did. I was chairman of the planning board — a member of the board of education, and secretary of the industrial commission.

Q. What specific activities come under the jurisdiction of the planning board?

MR. BERGSON: Mr. Examiner, may we have the witness fix the period of years that he lived in Matawan?

PRESIDING EXAMINER: Yes. That is a reasonable request.

THE WITNESS: From 1940 to 19 —

MR. BERGSON: From when?

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THE WITNESS: From 1940 to the end of 1962, December, 1962.

MR. BERGSON: When?

THE WITNESS: December, 1962.

MR. BERGSON: And which date in December?

THE WITNESS: Well, it was just prior to Christmas, just prior to Christmas; I believe it was before Christmas, although I can't give you the exact date.

PRESIDING EXAMINER: Would you kindly speak up. We don't want anyone to miss anything.

THE WITNESS: Yes, sir.

BY MR. HENNESSEY:

Q. And returning to my previous question; what are the specific functions of the planning board? A. We assist in drawing up zoning ordinances and receive subdivision maps, recommend to the township committee any recommendations in the orderly development of the township, both social and economic.

Q. What are the specific functions of the school board?

MR. BERGSON: Mr. Examiner, I would like to make a point of inquiry.

PRESIDING EXAMINER: Surely.

MR. BERGSON: This witness' responses to the questions which have just been put to him by the counsel are all in the present tense, but he has also stated that he is no longer

a resident of the town of Matawan, and I would like to inquire whether he still occupies any official position in the town of Matawan?

MR. HENNESSEY: He does not. I will rephrase the question, Mr. Examiner.

PRESIDING EXAMINER: Very well.

BY MR. HENNESSEY:

Q. During the periods in which you held a position on the Matawan planning board, what were the specific functions of the planning board?

MR. BERGSON: Objection, Mr. Examiner.

MR. COLL: Yes, I am not at all clear whether that period has been established.

MR. HENNESSEY: Well, I would be glad to establish it.

BY MR. HENNESSEY:

Q. How long were you a member of the planning board? A. From May of 1959 to December 31st of 1962.

Q. May of '59 to December 31st of 1962. All right. Now, during that period, what were the specific functions of the planning board? A. We undertook, in connection with new developments, a study of the new developments, and we would recommend any new legislation to the township committee in reference to zoning and general welfare of the township in matters of zoning.

Q. How long were you a member of the Matawan school board?
A. Three years and a half.

Q. From what period to what period? A. June, 1960 to January 1963.

Q. During this period, what were the specific functions of the school board?

MR. BERGSON: Mr. Examiner —

THE WITNESS: My own particular function, do you mean?

PRESIDING EXAMINER: Just a moment.

MR. BERGSON: Mr. Examiner, I object to this line of inquiry as being totally irrelevant and immaterial. I think it is too vague and too generalized to be of any value in this proceeding.

MR. HENNESSEY: Mr. Examiner, I am trying to establish the knowledge of the witness with respect to a community in which he lived during this period.

PRESIDING EXAMINER: Yes. The objection is overruled, he may answer it.

THE WITNESS: We have, in this time that I was there, undertaken many large building programs to further the needs of the township, the educational needs of the township.

BY MR. HENNESSEY:

Q. During this period, what was the most significant matter that was before the Matawan planning board?

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A. We had two developments come into the township. One was a housing development named Storyland, which was completed, and the second development was built by Levitt, called Strathmore.

Q. What is the present status of the Strathmore, at Matawan, development?

MR. COLL: I am going to object to this, Mr. Examiner, on the grounds of relevancy and materiality.

I don't see what difference it makes what status the construc-

tion of the housing development might be in, in Matawan at this point.

PRESIDING EXAMINER: Overruled. He may answer it.

MR. BERGSON: Well, I would like to make an objection, Mr. Examiner.

PRESIDING EXAMINER: I beg your pardon.

MR. BERGSON: I would like to object on the grounds of the competency of the witness to testify to the matter.

PRESIDING EXAMINER: That will be overruled, and he may answer it.

THE WITNESS: I spoke with the Levitt manager prior to coming down here, the sales manager, to verify some of my figures. Five hundred and seventy two families are in the development right now, and there are 600 slabs laid —

MR. BERGSON: Mr. Examiner, I move to strike that on the ground that it is hearsay.

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MR. HENNESSEY: Mr. Examiner, hearsay has always been admitted in Federal administrative proceedings. There is a long list of Commission and Supreme Court precedents that establish that hearsay in administrative proceedings, is admissible.

PRESIDING EXAMINER: Yes. There is no jury to be confused here, either.

MR. COLL: Excuse me, Mr. Examiner, but I want to make an additional objection going back to relevancy.

From what I have derived from observation of a number of these exhibits which are apparently going to be introduced here. There is an effort on the part of this applicant to vary the population of this community by referring to events subsequent to the 1960 census.

This witness' own statement which has been identified as Jupiter Exhibit No. 20, refers to the growth of this new housing development within the context of the 1960 census, and it has, I think, been well established before the Commission that the Commission does not permit applicants to try and second-guess what will build up in the way of population, aside from the census figures.

In effect, this is the purpose of this testimony, on the part of this witness, and I think it is objectionable.

PRESIDING EXAMINER: Well, I would like to make it clear that I am not going to take anything except the 1960

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census.

MR. COLL: With that assurance, Mr. Examiner, that it is not going to be used for any purpose such as I have just outlined, my fears are very much alleviated.

PRESIDING EXAMINER: If that were the case, we could have chambers of commerce, and anyone else coming in here giving predictions as to growth, and we have the United States Census, and we are hanging our hats on that 1960 Census.

MR. COLL: Thank you, sir.

PRESIDING EXAMINER: I can assure you of that.

MR. HENNESSEY: Mr. Examiner, I would like to state that these are not projections or predictions of any kind. These are matters that are within the knowledge of those people who are, or at one time very recently, were responsible civic officials, and had occasion to have knowledge of these specific matters, and functions elicited from this witness.

PRESIDING EXAMINER: Well, I appreciate that, but I also recognize that the witness has testified to certain facts here, including,

in reading his statement, an estimate that by the summer of 1964, the population of Matawan township will have increased by ten thousand over its present population count.

Now, of course, we come right back to the United States Census of 1960. Now, as I say, we are going to hang our hat on the U.S. Census, and I am not going to speculate on

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what is going to be happening up through 1964.

MR. HENNESSEY: But this is not speculation, Mr. Examiner. These are homes that are scheduled to be built within a certain time, and are being built.

PRESIDING EXAMINER: But in his exhibit he is testifying that there will be 10,000 more citizens there by the summer of 1964, and he testified that there was a count last year of eighty-two hundred.

Now, on population we can't go astray if we rely on the Bureau of the Census figures. But I have heard in these cases where they have taken counts and everything else, and if they just don't agree, we have to take exactly what we can rely on, and that is the U.S. Census.

MR. HENNESSEY: Mr. Examiner, in the Chaconas case, the Examiner held that figures of a census made out in Laurel which was taken after 1950, were admissible. The applicants relied on the 1950 census statistics, and Chaconas came in with a count that had been made and that was not included, and reflected in the census, but which reflected the increase of population well beyond 1950.

The Examiner admitted these into evidence, and the Commission, upon review of the Examiner's decision, affirmed the findings of the Examiner in that case.

PRESIDING EXAMINER: But I think that was after the 1950 census was obsolete, was it not?

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MR. HENNESSEY: No, sir. It was before the 1960 census was out.

MR. COLL: You are correct, but it was very late in the game, Mr. Examiner, when the 1960 census was being undertaken, but was not yet completed.

MR. STRICK: I believe, Mr. Examiner, the Chaconas case involved a head count, or maybe it was a house count — I am not sure — but it was a very accurate count of population, and I think in that instance, the circumstances were different.

I think in this case that the attempt is to show that there is a population growth going in on Matawan. But, as to showing the exact population —

PRESIDING EXAMINER: Well, I think that that would be a fair deduction anyway.

MR. COLL: Yes, Mr. Examiner. If that is the purpose Radio Elizabeth has no objection, as long as it is clearly understood that this is the only purpose for which it is being used. I hope it may be understood, because it will obviate a lot of cross examination on my part.

PRESIDING EXAMINER: Well, as I have said, and probably repeated this in the last ten or fifteen minutes, several times, I am going to look to the United States Census. I am glad to hear this witness testify as to their growth and their prospective growth in the respective communities. But I am not going to be bound by that.

MR. HENNESSEY: My only purpose in offering this testimony, or trying to elicit it, Mr. Examiner, is to show that the 1960 census figures are no longer applicable to these communities.

PRESIDING EXAMINER: They are still applicable as far as I am concerned.

MR. BERGSON: Mr. Examiner, if I might just make one observation —

PRESIDING EXAMINER: Certainly.

MR. BERGSON: The number of slabs that have been laid on the ground doesn't show the number of families occupying the township of Matawan at the present time.

PRESIDING EXAMINER: Mr. Bergson, you have been practicing before the Commission over a long period of time, and you know what the chambers of commerce in these townships will put into the record if you let them.

MR. BERGSON: I certainly do.

PRESIDING EXAMINER: You know that from your own personal experience.

MR. BERGSON: Yes, I do. I have tried it myself.

(Laughter.)

PRESIDING EXAMINER: You have tried it yourself. You might try it again before this hearing is over with.

MR. BERGSON: Yes, sir.

* * *

REDIRECT EXAMINATION

BY MR. HENNESSEY:

Q. Mr. Stenger, when you approached Matawan borough, from

Coltsneck, how do you observe that you are passing from one to the other? A. You don't. There is — one seems to run into the other one. You can't tell where the boundary is between the two. The physical boundary, I mean — You can't see.

Q. Well, when you approach Matawan borough, from Matawan township, is there any way that you could observe that you are passing from one into the other? A. I'd say no, there is not.

* * *

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JOSEPH P. PIZZI

* * *

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DIRECT EXAMINATION

BY MR. HENNESSEY:

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Q. Would you discuss how this exhibit was prepared and how these statements were prepared? A. Well, when we heard, when we discussed it with you, that we had to prepare this, Mr. Stafflinger and myself got in a car and went through the township and inquired in the township about the businesses there, and as I drove, he wrote them down.

Q. All right now. Are you talking about Exhibit No. 4 — Jupiter Exhibit No. 4, or one of the other exhibits? A. Well, we did all of them the same way.

Q. All right. Referring to Jupiter Exhibit No. 7 for identification, the businesses located in Keyport borough, how was that exhibit specifically prepared? A. Someone from — well, Mr. Stafflinger, and myself, in the car and we went around the town and wrote

down all the businesses, what they were, based upon personal observation.

Q. With respect to Jupiter Exhibit No. 6, how was that exhibit prepared? A. It was prepared in the same manner.

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Q. And with respect to Exhibit No. 5, how was that prepared? A. It was prepared in the same manner.

MR. HENNESSEY: Let the record show that I am handing to the reporter two copies of a one-page statement entitled: "Churches in Matawan area", marked for identification as Jupiter Exhibit No. 8.

BY MR. HENNESSEY:

Q. And I ask you, sir, if you prepared that exhibit? A. Yes.

Q. How did you prepare it? A. In the same way.

Q. Well, how did you do it, just for the record? A. Well, didn't you just ask me about the statement —

Q. No, the churches in the Matawan area, which is Jupiter Exhibit No. 8? A. Oh well, I was friendly, I was friendly with the priest — I mean in the Catholic church, and the others were through personal observation.

I contacted them.

Q. Is the list that is contained in Jupiter Exhibit No. 8 correct to the best of your knowledge? A. Yes.

MR. HENNESSEY: Mr. Examiner, I now offer Jupiter Exhibits Nos. 5, 6, 7 and 8 for identification.

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PRESIDING EXAMINER: How about No. 4?

MR. HENNESSEY: No, I want to establish a little more for the record — I want to ask a few qualifying questions of the witness with respect to that.

PRESIDING EXAMINER: Very well. You are offering Jupiter Exhibits 5, 6, 7 and 8, is that correct?

MR. HENNESSEY: Yes, sir.

PRESIDING EXAMINER: Is there objection thereto?

MR. BERGSON: Well, I would like to suggest, Mr. Examiner, that you defer ruling on those until after he has completed his direct examination on Exhibit No. 4. He is talking about establishing the witness' qualifications, and he should, I think, in the proper procedure, do this first.

PRESIDING EXAMINER: Mr. Hennessey, what do you say about that suggestion?

MR. HENNESSEY: That is perfectly agreeable with me, sir.

PRESIDING EXAMINER: Mr. Coll?

MR. COLL: Yes, certainly.

PRESIDING EXAMINER: Mr. Strick?

MR. STRICK: Same here.

PRESIDING EXAMINER: All right, let's do it that way.

MR. HENNESSEY: Very well.

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MR. HENNESSEY: I call to the stand, Mr. Ross Maghan.
Whereupon

ROSS W. MAGHAN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. HENNESSEY: I would like the record to indicate that I am handing to the reporter two documents, seven pages in length, which have been marked for identification as Jupiter Exhibit No. 3, the statement of Ross W. Maghan.

DIRECT EXAMINATION

* * *

BY MR. HENNESSEY:

Q. Has there been a significant increase in price of residential land in Matawan? A. Yes.

MR. BERGSON: In what period, sir?

BY MR. HENNESSEY:

Q. In the last two years? A. There definitely have.

MR. BERGSON: Mr. Examiner, I will object to that question on the basis that it is too vague.

What is a significant increase?

PRESIDING EXAMINER: Well, I think if he is going to explore it he should distinguish between the borough and the township, because the witness has testified that there is not much land available in the borough any longer, and whether that is residential or industrial land, I don't know.

MR. BERGSON: Well, I will make an even broader objection, Mr. Examiner, to the entire line of inquiry in the light of Mr. Maghan's response to an earlier question.

All he has said about Matawan is no different from the situation in thousands of other communities in the country where real estate values have been continuing to increase over a period of the last twenty years.

He has indicated that the increase in values depend entirely upon the use to which the land might be put in each instance and, for some uses, it may become extremely valuable and desirable, and for others, it may be worthless. But I don't see what decision or influence that can have on this type of inquiry, and I object to it.

PRESIDING EXAMINER: The witness has testified, and I am inclined to go along with you on this, Mr. Bergson, but the

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witness has testified that, with the two main railroads, and the parkway and Highway No. 34, that the land may be very valuable and could go up as high as \$50,000 an acre, as near as we can narrow it down, in attempting to particularize and pin it down to particular areas.

Now, I can't say, from what he has said, that there is some decisional value to the testimony. I am not saying that there is, or is not, or how I could make a finding as to property values in this area, because these questions are too broad, and I think I am going to sustain the objection to this line of questioning.

I don't want to preclude you on the 307-B issue, Mr. Hennessey, but this is just too much in the direction of generality and speculation here.

MR. HENNESSEY: This is submitted to show, Mr. Examiner, certain things that cannot be reflected in the 1960 census figures, or any other official United States Government sources.

So I submit, sir, that you can't consider these small communities and restrict a showing under 307-B to the municipal limits of one municipality. There are these interrelationships between these communities and I think it is essential that they be shown in Section 307-B matter.

PRESIDING EXAMINER: Well, I do think the line of questions and the answers are entirely too broad, and I will sustain an

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objection to the line of questioning.

BY MR. HENNESSEY:

Q. What industrial parks have been established in Holmdel in the last three years?

MR. COLL: I object, again, on the question of relevance.

PRESIDING EXAMINER: Sustained.

BY MR. HENNESSEY:

Q. What housing developments have been developed in Matawan in the last three years? A. The largest one —

MR. BFRGSON: You are talking about Matawan borough, or Matawan township?

MR. HENNESSEY: Matawan borough.

PRESIDING EXAMINER: You may answer it.

THE WITNESS: The largest one in the borough is Marc Woods, and there are two smaller developers building on a more or less individual basis, rather than mass production.

BY MR. HENNESSEY:

Q. Do you know what the value of land that is now occupied by Marc Woods was four years ago?

MR. BFRGSON: I object to that, Mr. Examiner.

MR. HENNESSEY: Mr. Examiner, it is submitted to show —

PRESIDING EXAMINER: Overruled. He may answer it, if he knows.

THE WITNESS: The acreage in that particular area was

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selling around a thousand dollars to fifteen hundred dollars an acre.

BY MR. HENNESSEY:

Q. At present? A. No, no.

Q. All right — A. Four years ago, you said.

Q. Yes.

MR. BFRGSON: Now, Mr. Examiner, I object to that answer and move that it be stricken as being not responsive to the question.

He was asked a specific question with reference to a specific property, and his answer relates to real estate in the general vicinity, in the area.

THE WITNESS: Mr. Examiner, I answered the question as it was asked.

PRESIDING EXAMINER: Let us have the question read back, please, Miss Reporter.

(The last question and answer were read back by the reporter.)

PRESIDING EXAMINER: The answer is responsive.

BY MR. HENNESSEY:

Q. Have you had occasion to drive to New York City? A. Have I had occasion?

Q. Yes?

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A. Yes.

Q. How long does it take you? A. From Matawan to the 49th Street Garage, parking garage, is exactly one hour.

Q. How long does it take you to get to the city limits of New York? A. Well I would — I don't know that exactly.

I know how long it takes to get to the airport.

Q. All right; how long then does it take you to get to the airport? A. About thirty five to forty minutes.

Q. What route do you use? A. The Garden State Parkway, and then you get off on what I refer to as Woodbridge, and get on to the Jersey Turnpike and get off the Turnpike at the Newark airport.

Q. Is there any access to New York City across Raritan Bay?

A. Not to my knowledge.

Q. Not by highway, I mean? A. Not by highway, not to my knowledge.

Well, could I ask you a question — I don't know exactly what you mean by that.

Q. You are not certain — A. I mean, all the roads, the Garden State Parkway, and all of them, go across the bay.

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Q. No, I mean, is there any bridge across Raritan Bay — that is what I mean — is there any direct access from Matawan to Staten Island that you know of? A. No, not without going to the other communities to get there.

All of these places have to go over Raritan Bay, the Garden State, I mean, it is not a bridge, but it goes across Raritan Bay, but not directly from Matawan.

Q. Not directly from Matawan? A. That's right.

Q. In your business experience, have you had occasion to spend any time or rather be in Marlboro township? A. Yes.

Q. How often would you be in Marlboro township? A. Several times a week — sometimes twice a day, sir.

Q. And with reference to Jupiter Exhibit No. 3, from what sources was the information contained in this exhibit contained?

A. My personal knowledge and experience of the area — some of it was obtained by officials in the area, and some of it from the chairman of the Monmouth County Planning Board.

Q. Was that particular official publication published by the planning board? A. It isn't a publication — it is an individual.

Q. No, I mean, is it put out by the government of

Monmouth County? A. Well, the Commission, the planning board, is a body of Monmouth county, if that is what you are asking.

Q. With respect to New Jersey State Route No. 34, on Page No. 2 at the end of the page of Jupiter Exhibit No. 3 for identification, how many lanes does that highway have? A. What do you refer to —

Q. Jupiter Exhibit No. 3, Page No. 2, at the bottom of the page — I will show you — How many lanes has that highway? A. Most places it is — Do you mean as it goes through Matawan?

Q. Yes? A. Two and four — mostly two lanes.

Q. When does it become a four lane highway? A. Well, when it goes under the approaches and crosses Main Street, Matawan, it has four for about a block to a block and a half, and then when you go up Main, the culverts and approaches, they have paved it, and it broadens out and then it narrows back again.

* * *

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,145

JUPITER ASSOCIATES, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

RADIO ELIZABETH, INC.,
Intervenor.

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

United States Court of Appeals
District of Columbia Circuit

FILED FEB 4 1969

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Other Authorities:

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* Origination Point of Programs of Broadcast
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* Particularly relied upon.

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Appellee,

RADIO ELIZABETH, INC.,
Intervenor.

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

This case has not previously been before this Court.

Appellant submits that the following questions are
presented:

1. When a comparison of the size, characteristics,
location and needs of two widely separated communities was
required by the issues, was evidence offered to establish
that Jupiter's community was more than the Borough and the

Township of Matawan and that 1960 Census data was obsolete correctly rejected by the Hearing Examiner?

2. When making the comparison of the applicants' communities pursuant to Section 307(b) of the Communications Act and the related issues, did the Commission consider Jupiter's community to be only the Borough of Matawan and, if so, did the Commission err in not considering areas contiguous and close to the Borough?

3. When making the comparison of the applicants' communities pursuant to Section 307(b) of the Communications Act and the related issues, did the Commission give full consideration to the location of each of the communities with respect to larger centers of population?

4. Do the findings of fact of the decision fully and fairly reflect the relevant and material evidence of the location of existing broadcast stations and the service they provide to the applicants' communities?

5. When making the comparison required by Section 307(b) of the Communications Act and the related issues, did the Commission fully consider the location of existing broadcast stations and the service they provide to the applicants' communities?

6. When comparing the needs of the applicants' communities for a new broadcast station, did the Commission

err in considering the power and other technical aspects of each proposal?

7. When making the comparison required by Section 307(b) of the Communications Act and the related issues, did the Commission err in giving weight to conclusions reached under issues relating to a Policy Statement in Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities?

STATEMENT OF THE CASE

This is an appeal, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 402(b), from a Decision of the Review Board of the Federal Communications Commission released January 25, 1965 (A. 27-47), and from a Supplemental Decision of the Review Board released April 5, 1968 (A. 110-128), both denying an application of Jupiter Associates, Inc., for a construction permit for a new standard broadcast station at Matawan, New Jersey, and from an Order released June 20, 1968, denying an application for review of said Decisions. (A. 129.)

Three mutually exclusive applications for new standard (AM) broadcast stations in three separate communities in northeastern New Jersey were designated for a consolidated hearing by an Order of the Federal Communications Commission released

September 11, 1962. (A. 1-5.) Each proposed a daytime only operation on the frequency of 1530 kilohertz. Jupiter Associates, Inc. (the Appellant), proposed the first station at Matawan and operation with a power of 500 watts and a directional antenna system. Somerset County Broadcasting Company proposed the first station at Somerville and operation with a power of 1,000 watts and a directional antenna system. Radio Elizabeth, Inc. (the Intervenor), proposed the first station at Elizabeth and operation with a power of 500 watts and a non-directional antenna system.^{1/} The issues were limited to the financial qualifications of Somerset County, the possibility of objectionable interference to or from an existing adjacent channel station at Mineola, New York, and the applicability of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 307(b), which is as follows:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The road through the Commission has been long and tortuous. After the applications had been designated for hearing, an

^{1/} Jupiter's application was filed on May 25, 1960; Somerset County's application was filed on July 7, 1960; and Radio Elizabeth's application was filed on April 28, 1961.

issue was added concerning Radio Elizabeth's technical qualifications. (R. 184-188.) Following hearings in 1963 and the issuance of an Initial Decision on December 10, 1963 (A. 5-27), the Review Board of the Commission issued a Decision on January 25, 1965 (A. 27-47), finding both Somerset County and Radio Elizabeth fully qualified--Jupiter had been found fully qualified by the original hearing Order--and then granting under the Section 307(b) issue^{2/} the application of Radio Elizabeth and denying the mutually exclusive applications of Jupiter and Somerset County. Applications for review by the Commission were filed by Jupiter and Somerset County. (R. 985-1012; R. 3257-3259.)

While the applications for review were pending before the Commission, this Court issued its opinion in Miners Broadcasting Service, Inc., v. Federal Communications Commission, 121 U.S. App. D.C. 222, 349 F. 2d 199 (1965). Following the remand in the Miners' case, the Commission invited the applicants in a number of cases, including this, to file briefs and present oral arguments to assist in the formulation of a policy to be applied when one or more mutually exclusive standard broadcast applications proposed a station in a suburb of a much larger city. (R. 1075-1077.) On December 27, 1965, the Commission issued

^{2/} The Section 307(b) issue was as follows:

5. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service. (R. 152.)

its Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 Federal Communications Commission Reports, Second Series, 190, 6 Pike & Fischer Radio Regulation, Second Series, 1901 (hereinafter referred to as the 307(b) Suburban Policy). Because the 5 millivolt per meter (mv/m) contours of Jupiter and Radio Elizabeth fell over some portion of New York City, the Commission, by a Memorandum Opinion and Order released on December 27, 1965, ordered a further hearing upon additional issues to determine whether either application should be considered as one for New York City rather than for the specified communities, Matawan and Elizabeth.^{3/} (A. 47-51.)

3/ The issues added under the 307(b) Suburban Policy were as follows:

(a) To determine whether each of the proposals of Jupiter Associates, Inc., and Radio Elizabeth, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which each specified station location has been ascertained by each of the two applicants to have separate and distinct programming needs;

(2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;

(3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and (Cont'd. on p. 7.)

At the further hearings in 1966 and 1967, extensive evidence was received for the first time concerning the program service rendered for Matawan and Elizabeth by the stations which provide a primary service signal (2 mv/m or better) to those communities.^{4/} On July 31, 1967, the Hearing Examiner released his Supplemental Initial Decision (A. 52-110) in which he first concluded that neither Jupiter nor Radio Elizabeth should be considered under the 307(b) Suburban Policy as applicants for New York City, and then reaffirmed the grant of Radio Elizabeth's application and the denial of Jupiter's and Somerset County's applications. A Supplemental Decision

3/ (Cont'd.) (4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the rules, including sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

4/ A limited amount of evidence concerning the unavailability of a station to provide programming of a local nature for the Matawan area and the service rendered by existing stations for the Matawan area had been offered and some received at the first hearing in 1963.

of the Review Board, released April 5, 1968 (A. 110-128), adopted the Supplemental Initial Decision with but few changes. Following denial by the Commission of applications for review (R. 3033-3051; R. 3052-3069; A. 129), Jupiter brought this appeal. Somerset County did not appeal and, therefore, is entitled to no further consideration.

This appeal seeks review of the following actions of the Hearing Examiner, the Review Board, or both: (1) the rejection of evidence offered by Jupiter for the purpose of establishing the size and character of its community for Section 307(b) purposes;^{5/} (2) consideration of Jupiter's community as only Matawan Borough when making the choice between communities under Section 307(b); (3) the manner in which some evidence relevant to the Section 307(b) choice was ignored and other evidence downgraded and misapplied; (4) consideration of the technical proposals of the applicants when weighing the needs of the two communities, Matawan and Elizabeth, for their first station after the conclusion had been reached that the technical proposal of each applicant fully satisfies all technical rules

5/ Because the Borough of Matawan had a population of only 5,097 persons in 1960 as compared to Elizabeth's population of 107,698, it was essential for Jupiter to establish that its community, for purposes of applying Section 307(b), was considerably larger. The confrontation of Matawan and Elizabeth can be likened to that between David and Goliath.

and standards; and (5) consideration of conclusions reached under the 307(b) Suburban Policy, that neither application should be considered as one for a New York City station, when comparing the needs of the two communities, Matawan and Elizabeth, for their first station.

Each of the questions presented by this brief are properly before the Court as each was presented to the Commission by Jupiter's applications for review. (R. 985-1012; R. 3052-3069.)

Section 307(b) of the Communications Act directs the Commission to make a "fair, efficient, and equitable distribution of radio service" to each of the "several States and communities." It will be shown more fully in the argument which follows that the term "radio service" means both transmission service and reception service; that transmission service is the availability of a readily accessible station to serve as a local outlet for news, expression and programs of special interest to a community; that reception service is the mere availability of a listenable signal, often from a distant transmitter;^{6/} that of the two,

6/ Origination Point of Programs of Broadcast Stations, Docket No. 8747, 1 Pike & Fischer RR 91:465 (1950). In that Report and Order, the Commission stated:

A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium of local self expression unless it provides a reasonably accessible studio for the origination of local programs.

(Emphasis supplied.)

transmission service is far more important; and that the word "communities" means a grouping of persons with common interests. Mercer Broadcasting Company, 13 Pike & Fischer RR 891 (1957).

Simply stated, the Section 307(b) issue^{7/} requires receipt and consideration of all relevant facts and a determination as to which of the two communities, Matawan or Elizabeth, has the greater need for a first broadcast station. The application for the preferred community then must be granted because each applicant is fully qualified to construct, own and operate the station each proposes. Relevant considerations under the Section 307(b) issue include:

- (1) The size and characteristics of each community;
- (2) The distance and relationship of each community to other communities and centers of population;
- (3) The distance to or accessibility of existing broadcast stations to each community; and
- (4) The program service, as well as the technical service, provided each community by existing stations.^{8/}

^{7/} The issue is set forth in footnote 2, above.

^{8/} Only a limited amount of evidence concerning the program service provided for the Matawan area was received at the first hearing. Program service was placed in issue by Issue (a)(2) under the 307(b) Suburban Policy. Issue (a)(2) is set forth in footnote 3, above. The technical service to each community, i.e., the availability of a listenable signal (reception service), was placed in issue by Issue 1 of the original hearing Order. (A. 1-5.)

NEW YORK NORTHEASTERN NEW JERSEY URBANIZED AREA



A brief summary of the uncontradicted and relevant facts will assist in understanding most of the questions and arguments presented in this appeal.^{9/} The map on the facing page shows the locations of the applicants' communities and other communities and areas to be discussed.^{10/} The heavily shaded areas are incorporated places within the New York-Northeastern New Jersey Urbanized Area, the lightly shaded areas are unincorporated areas within the urbanized area, and the unshaded or white areas are outside the urbanized area. The Newark Standard Metropolitan Statistical Area is made up of all of Essex, Morris and Union Counties and is included in the New York-Northeastern New Jersey Standard Consolidated Area.

Matawan, New Jersey

Jupiter's application specifies Matawan as the location of the proposed station. The map shows two areas bearing that name. The area labeled MATAWAN is Matawan Borough with a population of

^{9/} Jupiter has attempted to place any and all argumentative material in the Statement of the Case in the footnotes.

^{10/} The map is a reproduction of portions of pages 32-26 and 32-27 of the 1960 Census of Population, Volume I, Characteristics of the Population, Part A, Number of Inhabitants. Those two pages were used by Radio Elizabeth in preparing certain coverage maps which appear as page 11 of Radio Elizabeth Exhibit 3 and Figure 1 of Radio Elizabeth Exhibit 100-4.

5,097 according to the 1960 Census,^{11/} and an area of 2.5 square miles. The other area labeled Matawan is Matawan Township with a population of 7,359 and an area of about 5.5 square miles. Throughout the hearing, including the testimony of numerous witnesses, the name Matawan appears without distinction as to the Borough or the Township. A narrow strip of Matawan Township not more than 0.6 miles wide separates Matawan Borough and Keyport Borough, which had a population of 6,440 in 1960. The boundaries between Matawan Borough and Matawan Township and between Matawan Township and Keyport are unmarked and streets

11/ Unless otherwise noted, all population figures in the record and in this brief are based upon the 1960 Census even though the hearings were held in 1963, 1966 and 1967. The hearing had been underway only a few minutes when, on May 6, 1963, the Hearing Examiner, in sustaining an objection by counsel of Radio Elizabeth to evidence offered by Jupiter for the purpose of providing more up-to-date figures which would have shown the 1960 Census data to be hopelessly outdated and obsolete, ruled: "Well, I would like to make it clear that I am not going to take anything except the 1960 census." (A. 134-135.) At the time of the 1963 hearing, new residences were under construction, including a single 375 home project in Matawan Borough and a 1300 Levitt and Sons project in Matawan Township which, when occupied, would increase the population of Matawan Borough to 6,500 and Matawan Township to more than 14,500. (Jupiter Ex. 3, p. 2.) The 6,500 figure for Matawan Borough does not take into account the residents of 130 homes built in Marc Woods since 1960. (Tr. 90, L. 6-18.) Although some evidence was received for the limited purpose of showing growth, it was ignored in the conclusions of the four decisions. Even though the uncontradicted evidence proved the population of Matawan, the Borough and the Township, exceeded more than 21,000 in 1963, and the total population of the Borough, Township and Keyport exceeded 27,500 in 1963, the comparison of Elizabeth and Matawan was made upon the basis of a population of only
(Cont'd. on p. 13.)

running from one to another do not change their names (A. 138-139; Tr. 132, L. 13-21; Jupiter Ex. 10, p. 3.) All major employers and industries in the area are located in Matawan Township, Keyport, and Holmdel Township, and include the Bell Telephone Laboratories with 5,000 employees and the Lily Tulip Cup Corporation with 1,000 employees, both in Holmdel Township contiguous to Matawan Township.^{12/} Many services and organizations cut across the Matawan Borough and Township lines. For example, the Matawan Post Office is located in Matawan Borough and serves both the Borough and the Township as well as some surrounding rural areas. (Jupiter Ex. 19.) The Matawan Regional School Board serves both the Borough and the Township (Jupiter Ex. 20, p. 2.) There is a Greater Matawan-Keyport Council of Christian Churches. (Jupiter Ex. 12, p. 1.) Service

11/ (Cont'd.)

5,097 for Jupiter's community. Is it little wonder that Jupiter argues the denial of its application was arbitrary and capricious?

12/ Although evidence of major employers in the Matawan area was received in evidence over objection of counsel for Radio Elizabeth, the Hearing Examiner made no reference to the evidence in either of his Initial Decisions, thus making good on his ruling on the very first day of the hearing that "I am not going to permit any testimony relative to Holmdel." (Tr. 98, L. 24-25.) In fact, the word Holmdel appears only once in all four decisions. (A. 9.) The same treatment was given to churches. Evidence that the only Roman Catholic Churches in the area are located in Keyport and Holmdel Township was rejected. (Jupiter Ex. 8, received only with respect to churches in Matawan, Tr. 119, L. 8-9.) As will be shown more fully later, each and every one of 22 exceptions of Jupiter to the manner in which evidence

(Cont'd. on p. 14.)

clubs such as Rotary do not limit their membership to a single borough or township. (Jupiter Ex. 4, p. 1.) The Matawan Free Public Library is supported by and serves both the Borough and the Township. (Jupiter Ex. 4, pp. 1-2.) The record contains dozens of additional examples of common interests of the residents of Matawan Borough, Matawan Township, Keyport, and the nearby areas.

The map facing page 11 shows that the northern boundary of Matawan Township is about 21 airline miles south southwest of the southern tip of Manhattan Island in New York City, and that the center of Matawan Borough is about 29 airline miles from the approximate center of Manhattan Island. The map also shows that the boundaries of Matawan Township and New York City's Richmond Borough (Staten Island) are about 3.5 air line miles apart across Raritan Bay. The map also shows that the northern boundary of Matawan Borough lies approximately 17 airline miles south of the center of Elizabeth and approximately 21 airline miles south of the center of Newark. (Comparable figures appear in the record.) Because of the intervening bodies of water, travel to New York City's Manhattan Island by

12/ (Cont'd.)

concerning the true character of its Section 307(b) community was either rejected or ignored by the Examiner was denied by the Review Board as "not of decisional significance." (A. 44.) Seldom, if ever, has an applicant been the victim of such arbitrary and capricious treatment.

automobile, bus or train is by a circuitous route some 45 miles in length, passing through both Elizabeth and Newark. The land distance from the Matawan area to Newark is about 35 miles.^{13/}

(Jupiter Ex. 3, pp. 2-3; Ex. 4, p. 1.)

13/ Another example of the arbitrary and capricious downgrading of Jupiter and its community is the finding in paragraph 6 of the first Initial Decision (R. 805) and in paragraph 6 of the first Decision (R. 962) that Matawan is "approximately 4.2 miles from the nearest city limits of New York City, of which approximately three miles are over water." Anyone reading the findings of fact would only conclude that Matawan is a suburb of New York City. Yet, when describing Elizabeth, both the Hearing Examiner, in paragraph 23 of the first Initial Decision (A. 14), and the Review Board, in paragraph 9 of the first Decision (A. 31), found that "Elizabeth is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island Sound) and Newark Bay." The Review Board even went so far as to repeat all of the Hearing Examiner's findings except the statement that "Elizabeth is connected to Staten Island by the Goethals Bridge." (A. 14; 31-32.) Apparently the Review Board deemed it desirable to divorce Elizabeth even farther from New York City. Jupiter's exceptions to these findings and to the failure to include in the findings of fact the actual land distance between Matawan and New York City and Newark and the fact that Elizabeth is contiguous to New York City's Staten Island were "Denied as not of decisional significance." The summaries in paragraph 35 of the first Decision of some of Jupiter's arguments concerning the remoteness of Matawan to New York City (A. 35) do not take the place of findings of fact or an explanation of why the facts are "not of decisional significance, particularly since the arguments were directed to a comparison of the accessibility of existing stations from Elizabeth (three stations are located in next door Newark) and from Matawan (the nearest stations providing a primary service signal to Matawan are 35 miles away in Newark). Without some knowledge of the area or a map showing the locations of highways and bridges, one reading the findings of fact of all four decisions could only conclude that Matawan is closer to New York City than it is to Elizabeth. Jupiter sincerely hopes that, by this time, the Court fully understands the reasons for this appeal.

The closest broadcast stations to Matawan are WHTG, Eatontown, and WJLK, Asbury Park, approximately 13 and 19 miles, respectively from Matawan. However, neither provides primary service (a useable signal of at least 2 millivolts per meter) to Matawan. The only stations which provide primary service signals to Matawan are eleven full-time and two share-time stations in New York City, three stations in Newark, and one station in Patterson, New Jersey, which lies some 14 miles north of Newark. (Jupiter Ex 1, p. 1; Tr. 1268, L. 8-25.)

Executives of the three Newark stations and the eleven full-time and the two share-time New York City stations testified at the hearing in 1966 under Issue (a)(2) concerning the program services of the stations. The testimony of the 16 witnesses failed to disclose a single program or a single example of announcements originated from Matawan, broadcast for or on behalf of any Matawan area organization, or presenting any Matawan area resident, other than school closing announcements on Station WOR in New York City ^{14/}. (Tr. 1161-1214; Tr. 1291-1346; Tr. 1578-1650; Radio Elizabeth Ex. 300-1 to 300-17, inclusive; Jupiter Ex 21-A, p. 21.) No daily newspapers are published in

^{14/} As used in this paragraph, Matawan area means Matawan Borough, Matawan Township, Keyport, and Holmdel, Marlboro and Madison Townships.

the Matawan area. One weekly newspaper is published in Keyport which has a Matawan masthead and is virtually identical with a commonly published Keyport weekly. (Jupiter Ex. 4, p. 3; Jupiter Ex. 12-A, p. 8; Tr. 181, L. 2- Tr. 182, L.3.)

Elizabeth, New Jersey

Elizabeth, with a population of 107,698, is the County Seat of Union County, lies immediately south of and contiguous to Newark, which has a population of 405,220, and is a part of the New York--Northeastern New Jersey Urbanized Area, the Newark Standard Metropolitan Statistical Area, and the New York Northeastern New Jersey Standard Consolidated Area. Its importance as an industrial and service center is illustrated by the fact that the number of persons employed in Elizabeth, 137,837, exceeds its total population. Elizabeth is approximately 14 miles from New York City's Manhattan Island and is adjacent to New York City's Staten Island (Richmond Borough), being separated only by a narrow body of water known as Arthur Kill which is spanned by the Goethels Bridge. The Port of New York Authority operates Newark Airport, which lies between Elizabeth and Newark and partly in Elizabeth, and recently has completed Port Elizabeth for handling ocean shipping. (Radio Elizabeth Ex. 1, pp. 2, 6.) Although no broadcast stations are located in Elizabeth, three stations in Newark, eleven full-time and two share-time stations in New York City, one station in Patterson, and one station in

Morristown, New Jersey, provide primary service signals to Elizabeth. (Radio Elizabeth Ex. 1, p. 18.)

The program service which the three Newark stations provide for Elizabeth was developed at the 1966 hearing under Issue (a)(2) through the testimony of the Director of Quality Control for the licensee of Station WNJR (Tr. 1578, L. 12-21), the President of the licensee of Station WVNJ (Tr. 1618, L. 13-21), and the General Manager of Station WJRZ. (Tr. 1631, L. 8-14.) The examples of program service for Elizabeth were so numerous that they are summarized in Appendix A of this brief. The program services which the eleven full-time and two share-time stations in New York provide for Elizabeth were developed under Issue (a)(2) through depositions of executives of the stations. Their testimony established that each station attempts to serve the needs of Elizabeth as an integral part of the eighteen county New York metropolitan area ^{15/}. (Radio Elizabeth Ex. 300-1 to 300-17, inclusive.) A summary of the facts produced through their testimony is submitted as Appendix B.

The manner in which the Newark Stations have been and are readily accessible to serve as local outlets for Elizabeth is

15/ The New York-Northeastern New Jersey Standard Consolidated area, as defined by the 1960 Census, is made up of the 16 New York and New Jersey counties which, in turn, make up the New York City, Newark, Jersey City, and Patterson-Clifton-Passaic Standard Metropolitan Statistical Areas plus Middlesex and Somerset Counties in New Jersey. (1960 Census of Population, Volume I, Characteristics of the Population, Part A, Number of Inhabitants, page 34-30.)

further illustrated by the testimony of the Mayor of Elizabeth, Thomas G. Dunne, who had been in office for twenty months at the time he testified in 1966 and who had served as a member of the Union County Board of Free Holders for six years before becoming Mayor. (Tr. 1347, L. 19-Tr. 1348, L. 13.) He testified that he recalled using Stations WJRZ (Newark) and WPAT (Patterson) and a Polish program on an unidentified station during his political campaigns. (Tr. 1350, L. 5-24.) News of Elizabeth, some emanating from the Mayor's Office, is broadcast by Newark stations to which the Mayor listens, but not in a manner satisfactory to him. (Tr. 1361, L. 9-Tr. 1363, L. 4.) He further testified:

A. WPAT is one of the stations I am familiar with, that must be Patterson. WMRK [sic] in Newark, WJRZ often will interview me either by telephone or visits to my office, so we do have cause to tune in either at specific times or at times during the day when we would expect news broadcasts to be made to hear how the interview was being handled by that station.

Sometimes we were satisfied, but in most instances we felt that not as much attention was paid to the interview as should have been. The interview was often cut to the bone so I do have occasion to tune in these Newark stations because perhaps I, as Mayor, am more interested than the average person might be.

No station, to my knowledge, ever makes a special endeavor to reach the 120,000 people in the city of Elizabeth, either with news broadcasts or other items of interest 16/. (Tr. 1363, L. 16-Tr. 1364, L. 5.)

16/ The first Newark station probably was WNJR, not WMRK, because there is no station with such call letters in the area. Transcript errors are not unusual where call letters are involved.

Although the Mayor was not satisfied, the fact that the Newark stations do provide service for Elizabeth is further proven by the following:

Q. Do either of the stations you indicate you do listen mention they cover and carry a number of interviews both with yourself and your directors?

A. Yes, and community leaders and school administrators.

(Tr. 1364, L. 11-14; Emphasis supplied.)

Other examples of at least some service were coverage of an award by the National Safety Council to Elizabeth, drinking in neighboring Staten Island by 18 year olds, and a murder.

(Tr. 1364, L. 15-Tr. 1365, L. 23.) The Mayor has been invited by Station WVNJ, Newark, to be interviewed by telephone and testified: "I have taped some shows there for a charitable organization." (Tr. 1373, L. 22-Tr. 1374, L. 5.)

The Decisions

The end result was a though the Examiner and the Review Board had started with the ultimate conclusion that the Elizabeth application should be granted and then worked backwards to eliminate from any serious consideration those elements of Section 307(b) and that evidence which, if fully considered, would have led only to the grant of the Matawan application.

Of course, that did not happen.

What did happen was that the seed of the cancer which permeates this entire case was planted in the very first day of the hearing by two hasty and unfortunate rulings of the Examiner rejecting evidence offered to establish the size and character of Jupiter's community. That seed was nourished and the cancer grew because of uncertainty at the time as to how Section 307(b) should be applied in cases involving two or more mutually exclusive applications, at least one of which specified a suburb of a major city as the station location. In those cases, the Commission recognized that the suburban application always would be preferred if the relationship of that community to the major city was not considered and the choice between applications was to be based solely or primarily upon the populations of the communities.

The Examiner's rulings were made on May 6, 1963. Shortly thereafter, and before his Initial Decision was released on December 10, 1963, the Commission issued final decisions in three cases involving a Section 307(b) choice between mutually exclusive applications, at least one for a suburb of a major city. They were Radio Crawfordsville, Inc., 34 FCC 996, 25 Pike & Fischer RR 533, released May 24, 1963; Speidel Broadcasting Corp. of Ohio, 35 FCC 74, 25 Pike & Fischer RR 723, released July 8, 1963; and Monroeville Broadcasting Company, 35 FCC 657, 1 Pike & Fischer RR 607, released December 2, 1963. That each of those three

cases was decided by irrational reasoning was made clear by this Court in its opinion in Miners Broadcasting Service, Inc. v. Federal Communications Commission, supra, which remanded Monroeville to the Commission for reconsideration. ^{17/}

The overall question of how a mutually exclusive application for a suburb of a major city should be considered when making the choice between applications required by Section 307(b) was further confused prior to the issuance of the Review Board's first Decision by a proposal of the Commission to codify as a rule the "fuzzy" rationale of Radio Crawfordsville and Speidel. Because the Review Board does not have authority to initiate or establish new policy but must base its considerations and decisions upon established case precedents and policies ^{18/}, it placed most significant reliance upon the rule making proposal ^{19/} in rejecting Jupiter's arguments that, under established

^{17/} In fairness to the Examiner, it must be noted that he made no effort to apply the rationale of those three decisions in his Initial Decision-he did not even mention them and did not cite even a single case precedent in his Section 307(b) conclusions (A.22-25)-even though the Radio Crawfordsville and Speidel decisions had been called to his attention by Jupiter in both its Proposed Findings of Fact and Conclusions of Law (R.751-752) and replies to the proposed findings and conclusions of the other parties (R.755-756, 769-770.)

^{18/} Section 0.361(d) of the Commission's Rules and Regulations, 47 C.F.R. Section 0.361(d).

^{19/} After a lengthy discussion of the Commission's Notice of Proposed Rule Making in re Amendment of Part 3 of the Commission's Rules Regarding AM Station Assignment, Docket

precedents ^{20/}, the proximity and relationship of Elizabeth to its much larger next door neighbor, Newark and to be given most significant weight in making the Section 307(b) choice between Elizabeth and Matawan. ^{21/}

19/ (Cont'd from p.20)

No. 15084, 25 Pike & Fischer RR 1615, and the subsequent Report and Order, 1 Pike & Fischer RR 2d 1658, the Board held in paragraphs 29 and 30 of its first Decision, that an application for a suburban community with a population greater than 50,000 should not be considered as a proposal for the larger or principal city or the urbanized area (R. 973-974). The practical effect of that holding was that an application for a suburban community with a population of greater than 50,000 should not be considered as a suburb. The Commission, in its Memorandum Opinion and Order released July 9, 1965 (R. 1075-1077), ordering briefs and oral argument on the policy questions presented by this Court's opinion in the Miners case, rejected the Review Board's conclusions:

5. We take this opportunity to point out that we have no such "underlying Policy" as that to which the Review Board referred in its Decision in the Matawan proceeding, namely, "to limit to suburban communities of 50,000 or less the case-by-case consideration of whether proposals for the suburban communities "should be regarded as an application for the central city" (R. 1076-1077).

20/ Radio Crawfordsville, Speidel and Monroeville, and one of the first of the series of suburban community cases, Huntington Broadcasting Co., 5 Pike & Fischer RR 721 (1950), affirmed Huntington Broadcasting Co. v. Federal Communications Commission, 89 U. S. App. D.C. 222, 192 F. 2d 33 (1951).

21/ Counsel for Jupiter was thoroughly familiar with the Radio Crawfordsville, Speidel and Monroeville cases because he represented the successful small community applicant in each.

(Cont'd on p. 24)

With the "fuzzy" decisions in Radio Crawfordsville, Speidel and Monroeville and the later rejected rule making proposal and policy statement before it as case precedents, the reasons for the Review Board's failure to give any meaningful consideration and weight to much of the evidence and to Jupiter's exceptions to the Initial Decision become much more understandable.

Unfortunately, the uncertainty did not end with the issuance of the 307(b) Suburban Policy Statement, supra, on December 27, 1965. The Supplemental Initial Decision of the Examiner (A. 52-110) and the Supplemental Decision of the Board (A. 110-128), including rulings upon some of Jupiter's exceptions, clearly establish that each believed the only issues before him at the second hearing were those pertaining to the 307(b) Suburban Policy and that, once the conclusions had been reached that both Jupiter and Radio Elizabeth had rebutted the presumption under the 307(b) Suburban Policy issues that their applications should be considered as was for New York City, the only course available was to reaffirm the original decisions.

21/ (Cont'd from p. 23)

The records in each case, as well as the record in this case, show that he never urged or supported the rationale of those decisions. What he did urge was that the close relationship between the suburb and its nearby major city had to be given most significant weight when making the Section 307(b) choice if the needs of smaller communities remote from larger centers of population were to be satisfied. That is the exact same argument presented in this case.

Some uncertainty over the 307(b) Suburban Policy continues even now, as evidenced by a number of appeals pending before this Court involving the policy. However, this appeal presents only a most peripheral question concerning the policy.

Reestablishment by this Court of the fundamental concepts and considerations of the "fair, efficient, and equitable distribution of radio service" provision of Section 307(b) of the Communications Act is necessary to protect the rights of many millions of persons residing outside urban and metropolitan areas to enjoy the benefits of their own local radio station. This is what this case is all about.

ARGUMENT

This appeal involves the interpretation and application of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C., Section 307(b):

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

This is the first time in many years that the Court has been called upon to consider and protect the rights of residents of the smaller communities and contiguous rural areas to have the

the benefits of a local radio station.

The Commission and Radio Elizabeth undoubtedly will argue that the Commission merely has exercised its expertise in the manner delegated by Congress and that the Court should not interfere even though it might have reached another conclusion. Ordinarily Jupiter would agree. But where, as here, the Commission (through its Examiner and Review Board) lost sight of certain fundamental concepts embodied in Section 307(b), this Court has the duty to act.

A brief review of certain fundamentals will assist in a better understanding of this appeal and the arguments.

When Congress amended Section 307(b) in 1936 to substitute the present language for a zone and quota system of broadcast station allocations, it intended the Commission to consider and provide for the needs of persons residing in small communities and nearby rural areas for radio service as well as those residing in the urban and metropolitan areas and cities. That objective has been so well understood and consistently applied for the past 32 years that there are only a few reported decisions concerning the intent of Congress.

There are three keys to this case.

The first key is the term "radio service" as used in Section 307(b). One of the clearest explanations appears in

a 1950 report of the Commission concerning the Origination Point of Programs of Broadcast Stations, Docket No. 8747,

1 Pike & Fischer RR 91:465, 91:466:

We have consistently held that the term "radio service" as used in Sec. 307(b) comprehends both transmission and reception service. Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable radio signal. It is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium of local self expression unless it provides a reasonably accessible studio for the origination of local programs. (Emphasis supplied).

The same definition appears in so many decisions issued over the years that, except for those discussed below, no citations are necessary.

The objective of Congress to provide the smaller communities and surrounding rural areas with their own stations was clearly recognized by the Commission in Northwestern Ohio Broadcasting Corporation, 3 Pike & Fischer RR 1945, 1954 (1948), which involved a Section 307(b) choice between mutually exclusive standard

22/
broadcast applications for new stations at Columbus, Ohio,
and much smaller Lima, Ohio:

5. In making this determination to prefer Lima, we are aware that the Sky Way Broadcasting Corporation would serve a larger population both day and night, and particularly during the day when it proposes to use 5 kw power and would serve a population approximately three times greater in an area more than two and one-half times larger than would the Lima applicant. We have further considered the fact that regional channels, such as is requested here, are normally allocated to render primary service to metropolitan areas and rural areas contiguous to those districts. However, we believe that the foregoing factors are outweighed by the greater need in respect to radio broadcast service to the substantial population of the city of Lima and of its rural area which presently does not receive a choice of locally originated programs. For unless due recognition is given to the claims of smaller communities embracing a population of some substantial size, an undue concentration of facilities in the larger communities will inevitably result. . . . It is evident from our discussion herein that we have considered each of the criteria of Section 307(b); however, there is nothing in the Communications Act, our Rules or Regulations, or our policy which requires the Commission, in a comparative proceeding such as this, to give equal weight to each criterion without regard to the facts of each particular case and the substantial compliance of such facts with the criteria of this Section when viewed in the light of the mandate of the Communications Act, requiring the Commission to provide the most widespread and effective broadcast service possible to this country. (Emphasis supplied).

22/ Unless otherwise noted, all decisions and cases cited in this brief involved standard broadcast (AM) stations or applications.

An excellent but lengthy discussion of Section 307(b) and the intent of Congress may be found in Newark Broadcasting Corporation, 11 FCC 956, 3 Pike & Fischer RR 839, 853 (1947).

Pertinent excerpts are set forth in Appendix C of this brief.

The second key to this case is the word "communities" as used in Section 307(b). Without a doubt, the most troublesome problem in recent years has been with the meaning of that word. Some have argued that the word had to be interpreted literally and that a community could only be an incorporated place. Perhaps the clearest of many statements concerning the composition of a community appears in Mercer Broadcasting Company, 13 Pike & Fischer RR 891, 909 (1957), in which the Commission said:

10. There is no hard-and-fast rule by which it can be judged whether a particular population grouping is to be classified as a community for making the choice required by Section 307(b); . . . Examination of these and other cases in which the "community" question has arisen shows that all of the relevant facts in each case must be weighed before a valid answer can be forthcoming.

11. At the outset we may dispose of the suggestion that the fact of incorporation or non-incorporation of the group [of communities] in question is of decisive import. In numerous cases the Commission has ruled that the fact that an area is incorporated is not enough in itself to justify its treatment as a separate "community" for 307(b) purposes; conversely, the absence of

incorporation does not compel the conclusion that a group is not a "community". The corporate status of a community is but one factor to be weighed in any 307(b) decision. There is nothing new, as Mercer seems to imply, in the idea of selecting one of several applicants on 307(b) grounds even though the community in which the winner proposes to operate is unincorporated. 32/

32/ See The Connecticut Electronic Corp., 5 RR 469, in which the applicant proposing to serve an unincorporated village was selected on the basis of need for a local transmission facility. (Emphasis supplied).

It is well established that a community, for Section 307(b) purposes, may be more than just an incorporated area. In Broadcasters, Inc., 16 Pike & Fischer RR 295, 301 (1957), the Commission held that the contiguous and separately incorporated areas of Plainfield and South Plainfield, New Jersey, were a single community:

13. . . . The Commission has found on occasion, where frequencies other than "local" channels were involved, that the "community" to be served, for Section 307(b) considerations, encompassed more than the area within the corporate limits of the principal city named in the applications or station license. See Huntington Broadcasting Company, 5 RR 721, 6 RR 569 (1950).

No useful purpose would be served by citing other cases involving definitions of "communities" as they all reached similar conclusions.

The third key to this case may be found in a series of cases involving the relationship of an applicant's community to larger centers of population. One of the earliest such cases involving, as here, at least one mutually exclusive application for a community close to a major city, was the 1949 case of Times-Star Publishing Co., 4 Pike & Fischer RR 718, 725. The facts were strikingly similar to those in this case, even as to populations, distances, and makeup of the smaller community. One application was for the first station at Alameda, which had a population of 89,906 (in 1945) and was contiguous to Oakland (although separated by an estuary and a distance of about 5 miles). The other application was for the first station at Palo Alto, which had a population of 18,261 (in 1948) and was some 30 miles south of Oakland and San Francisco. In preferring the application for the smaller community, Palo Alto, the Commission stated as follows:

2. Based upon consideration of the character of the two communities involved in this proceeding and the availability of out-of-town broadcast transmission facilities to each, the Commission is of the opinion that a more definite need for a radio facility to serve the local needs of the community is greater in the case of Palo Alto than Alameda. Both communities are in the San Francisco-Oakland metropolitan district, and neither has a standard broadcast facility of its own. Although the population of Alameda is approximately twice the size of Palo Alto and the principal cities

surrounding it, Alameda is, because of its contiguous location to Oakland, a more integral part of the San Francisco-Oakland area than is Palo Alto, which is located approximately thirty miles from San Francisco and from Oakland. For this reason, the San Francisco and Oakland standard broadcast facilities are, for all practical purposes, unavailable to the residents of Palo Alto and its surrounding communities. By contrast, the contiguous location of Alameda to Oakland not only affords the residents of Alameda the use of the three standard broadcast facilities at Oakland but, in addition, San Francisco is located approximately ten miles from Alameda and, thus, the San Francisco standard broadcast facilities are more accessible to the residents of Alameda than to the residents of Palo Alto. The Commission, therefore, believes that it would not be in the public interest to authorize a station to Alameda, which has the availability of three standard broadcast stations located contiguous to that city and to deny the Palo Alto application, when Palo Alto and its surrounding communities, at most, have access to one San Mateo broadcast station, located approximately twenty miles from Palo Alto, which has recently established a Palo Alto auxiliary studio. Moreover, Palo Alto receives fewer primary radio signals from out-of-town radio stations than Alameda, although both communities receive numerous primary radio signals. Accordingly, we believe that the requirements of §307(b) would be better achieved by a grant to Palo Alto than by a grant to Alameda. (Emphasis supplied).

Another more recent case which is remarkably similar to this case was Radio Haddonfield, Inc., 37 FCC 168, 170, 3 Pike & Fischer RR 2d 25, 28 (1964). In preferring the application for the smaller, more remote community over an application for Haddonfield, New Jersey, the relationship of Haddonfield to

Camden was considered:

The importance of communities to their surrounding areas has been held to be of substantial and decisive importance in two recent decisions of the Board, and this aspect of the present case must, therefore, be considered. (Footnote citation omitted).

The comparative criteria which must be considered when making the choice between mutually exclusive applications for different communities pursuant to Section 307(b) of the Act include each of the following:

- (1) The size and characteristics of each community;
- (2) The distance and relationship of each community to other communities and centers of population;
- (3) The distance to or accessibility of existing broadcast stations to each community; and
- (4) The program service, as well as the technical service, provided each community by existing stations.

Now the Commission has closed its eyes to and turned its back on these fundamental concepts and interpretations of Section 307(b)! It not only refused to receive evidence offered to establish the size and character of Jupiter's community, but even limited Jupiter's community to the corporate limits of Matawan Borough. It gave no meaningful consideration to the relationship of Matawan and Elizabeth to the nearest (by land) larger city, Newark, and even said that the fact that Matawan

is 35 land miles from Newark and 45 land miles from New York City was "not of decisional significance." It not only gave no meaningful weight to evidence that the Newark stations actually provide some local service for Elizabeth, but even held that the availability of and distance to existing stations from Matawan and Elizabeth was "not of decisional significance."

Now the Commission no longer can avoid explaining (1) why evidence offered to establish the size and character of Jupiter's community was not relevant; (2) why up-to-date population data, which would have shown that the 1960 Census data was outdated, was not relevant; (3) why Jupiter's community was considered as only Matawan Borough; (4) why the distance by land from Matawan to Newark and New York City was "not of decisional significance"; (5) why the remoteness from Matawan of all broadcast stations which provide primary service to Matawan was "not of decisional significance"; (6) why the absence of any meaningful program service for and by Matawan organizations and officials was "not of decisional significance"; (7) why accurate findings of fact concerning the program service actually provided by the three Newark stations for Elizabeth organizations and officials were not made; (8) why the proximity and accessibility of the three Newark stations to Elizabeth was "not of decisional significance"; (9) why the proximity of Elizabeth and Matawan

to New York City and Newark was not actually compared under the Section 307(b) issue; (10) why the program service rendered by existing stations to Matawan and Elizabeth was not compared under the Section 307(b) issue; (11) why the proximity and accessibility of existing stations, particularly the three in Newark, to Matawan and Elizabeth were not compared under the Section 307(b) issue; (12) why the needs of a community for its first broadcast station do not exist irrespective of the technical proposal of an applicant for that community; and (13) why long established case precedents were ignored.

Unless the Commission comes forward in its brief with reasonable answers to each and every one of these questions, a remand is required.

I

JUPITER'S COMMUNITY IS MUCH LARGER
THAN DETERMINED BY THE COMMISSION

As shown on the map facing page 11, there are two areas bearing the label Matawan. The smaller area, which is labeled "MATAWAN," is the Borough, and the other, which is labeled "Matawan," is the Township. Immediately contiguous to the Township and less than 0.6 miles from Matawan Borough is the Keyport Borough. Holmdel Township abuts Matawan Township,

and Marlboro and Madison Townships abut both Matawan Borough and Matawan Township.

Jupiter's intention to provide a local broadcast station and program service for more than just Matawan Borough and Matawan Township was disclosed in its original application, which was filed on May 25, 1960, and continuously thereafter in its application. Evidence to prove that its community, for Section 307(b) purposes, was more than just Matawan Borough and/or Matawan Township was not offered merely to improve its comparative standing.

In its original application, Jupiter gave the location of the proposed station as "Matawan-Keyport" and the main studio location as "to be determined."^{23/} Because of difficulties encountered by other applicants in satisfying the most rigid requirements of the Commission's dual-city designation rule^{24/},

^{23/} Section I, paragraph 1, of the application form, FCC Form 301, contains a box labeled "City" under the heading "Station location." Section V-A, paragraph 3, has a box labeled "City or town" under the heading "Station location," and a similar box in paragraph 5 under the heading "Main studio location" and another box under that same heading "Street and number, if known."

^{24/} Section 73.30(b) of the Commission's Rules, 47 C.F.R. Section 73.30(b), which was Section 3.30(b) at the time the application was filed.

Jupiter amended its application some 15 months later to specify the proposed station's location as "Matawan, New Jersey." The original program proposal was not amended until 23 months after the application had been filed. The name "Matawan" never appears above in any of the program titles, but always as "Matawan-Keyport," even after the station location was amended to "Matawan, New Jersey." Some program titles in the amended program schedule referred to "Matawan-Keyport and Area News."

At the hearing, Jupiter offered evidence concerning the size and character of Matawan Borough, Matawan Township and Keyport, and evidence concerning the relationship of Holmdel, Marlboro and Madison Townships to the two Matawans and Keyport. As will be shown in the discussion which follows, the Examiner ruled that only evidence concerning Matawan would be received and considered. Even then he did not distinguish between the Borough and the Township. A substantial amount of evidence was rejected.

At the hearing, Jupiter offered evidence to prove that the population figures of the 1960 Census were obsolete because of an influx of persons into newly constructed homes. As will be shown, the Examiner ruled that only 1960 Census data would be considered.

In all four decisions, Jupiter's community was considered as being only Matawan Borough, with a population of 5,097, when compared under the Section 307(b) issue with Elizabeth, with a population of 107,698. Even the limited amount of evidence received supported the conclusion that Jupiter's community, for Section 307(b) purposes, consists of Matawan Borough, Matawan Township, and Keyport, with a total population of 18,896 in 1960 and in excess of 25,000 in 1963. Is it little wonder that Jupiter's application was denied?

A. The Examiner Erred In Rejecting Evidence
Concerning Areas Other Than Matawan

It is well settled that a community, for purposes of making a Section 307(b) choice between mutually exclusive applications, is not necessarily an incorporated place but may be even more. In Mercer Broadcasting Company, supra, the Commission held as follows:

10. There is no hard-and-fast rule by which it can be determined whether a particular population grouping is to be classified as a community for making the choice required by Section 307(b) Examination of these and other cases in which the "community" question has arisen shows that all of the relevant facts in each case must be weighed before a valid answer can be forthcoming. (Emphasis supplied).

In Times-Star Publishing Co., supra, the Commission clearly considered the Palo Alto applicant's community to be more than just the incorporated city without ever clearly defining the exact size and composition of the applicant's community.

4. The City of Palo Alto is located at the southern end of the San Francisco-Oakland metropolitan district, approximately 30 miles from Oakland, Alameda and San Francisco. Palo Alto is within Santa Clara County, and according to the 1940 U.S. Census had a population of 16,774 persons, while the present population is estimated at 18,261 persons. The City of Palo Alto serves as a shopping center for a number of small cities within a radius of 10 miles. The largest of these cities are Redwood City, Menlo Park, and Mountain View, with a total population of 27,442 persons. In addition, Stanford University, with a student population of 8,000 is situated in Palo Alto.

On the very first day of the hearing, which was convened at 1:30 P.M., the Examiner ruled that only evidence concerning Matawan would be received and considered. He based his ruling solely upon the fact that the application specified Matawan as the location of the proposed station. ^{25/} This most crucial

25/ The Hearing Examiner stated as follows in sustaining an objection on grounds of relevancy to evidence concerning Holmdel Township:

PRESIDING EXAMINER: Well, it certainly points up to me, Mr. Hennessey--that this is not a Holmdel station. This is for Matawan Station or proposed Matawan station, and I think I will sustain the objection to the line of questioning relative to Holmdel. (Tr. 96, L23-Tr. 97, 12).

(Cont'd on p. 40)

ruling was not preceded by any significant amount of argument and was not based upon any cited authorities.

Jupiter had the basic right as well as the duty to present evidence concerning the composition and size of its community. In not receiving evidence from which Jupiter's community could be determined, the Examiner "put the cart before the horse"

25/ (Cont'd from p. 39)

Later the Hearing Examiner said:

PRESIDING EXAMINER: Well, I cannot see, Mr. Hennessey, why we should go into the background of Holmdel when we are talking about a Matawan station.

Now there has to be some limitation to it, and I am not going to permit any testimony relative to Holmdel. (Tr. 98, L21-25).

With respect to evidence concerning adjacent Keyport Borough, the Hearing Examiner ruled as follows:

PRESIDING OFFICER: Well, in a ruling a minute ago on Holmdel, that is exactly what I had in mind. He was going into every community around there, and recognizing that this is a Matawan station, it disturbs me a little bit, Mr. Hennessey, when we are trying to get into and embrace all these communities, or neighborhoods, or whatever you call the, that cluster there, together, when it gets beyond the service area which is spelled out. (Tr. 115, L23-Tr. 116, L5).

Similar rulings were made on other evidence not limited solely to Matawan Borough or Matawan Township. (Tr. 119, L3-9; Tr. 154, L10-25; Tr. 204, L11-21; Tr. 205, L20-24; Tr. 208, L1-2; Tr. 210, L21-Tr. 211, L12; Tr. 214, L1-7; Tr. 216, L5-7; Tr. 218, L21-Tr. 219, L1).

by prejudging the composition and size of Jupiter's community before any significant amount of evidence had been received or even offered.^{26/}

The rulings were most prejudicial to Jupiter, not only because they made it impossible for Jupiter to present evidence to establish the composition and size of its community, but also, as will be shown below, they led the Examiner and the Review Board to consider Jupiter's community as only Matawan Borough.

^{26/} As shown in footnote 25, above, the initial rulings appear on pages 96 and 98 of the transcript on the very first day of the hearing, which was convened at 1:30 P.M. (Tr. 23), while only the fourth non-engineering witness was on the stand before more than three non-engineering exhibits, each consisting of written testimony, had even been offered in evidence. The rejected evidence related to Keyport and portions of Holmdel, Marlboro and Madison Townships. If the accuracy of this statement is challenged by the other parties in their briefs, Jupiter will document it with particularity in its reply brief and in the Joint Appendix. At this time, however, it appears that no useful purpose would be served by extensive citations and lengthy summaries of offers of proof.

B. The Examiner's Rejection of Up-To-Date
Population Data Was Erroneous

At the very outset of the hearing, Jupiter offered evidence to show that residential construction in Matawan Borough, Matawan Township, and some immediately adjacent areas had been so great since the 1960 Census had been taken that the Census figures were hopelessly out-of-date. Because any evidence of growth of Jupiter's community would be adverse to Radio Elizabeth, it objected. (A. 134-135.) The Examiner sustained the objection, stating as follows: "Well, I would like to make it clear that I am not going to take anything but the 1960 Census." (A. 135.) That ruling was repeated a number of times in the following minutes even though counsel for Jupiter pointed out that evidence based upon completed construction and occupancy certainly was not a projection of future growth. (A. 135-136.) One of the comments of the Examiner was that ". . . I am not going to speculate on what is going to be happening up through 1964." (A. 135-136.) (Emphasis supplied). Now it is almost 1969!

Evidence to show growth of a community since the last decennial census always has been received. For example, in the quotation from the decision in Times-Star Publishing Co., supra, on page 31, above, the Commission noted that "Palo Alto

is within Santa Clara County, and according to the 1940 U.S. Census had a population of 16,774 persons, while the present population is estimated at 18,261 persons."

When counting population within a signal strength contour which encompasses a number of different municipalities, and minor civil divisions, the decennial census must be used for the entire area. Otherwise, the result would be a mixture of dissimilar information. If the post-1960 population evidence had been offered under the technical issue, the ruling of the Examiner would have been one hundred percent correct. But where it was offered under the Section 307(b) issue for the purpose of presenting the latest available evidence under that most crucial issue, the ruling clearly was erroneous and most prejudicial.

In spite of the Examiner's ruling, some evidence of population growth was received. However, it was completely ignored in all four decisions. The uncontradicted evidence is summarized in footnote 11, above, and proves that the combined population of Matawan Borough and Matawan Township had increased from 12,456 in 1960 to more than 21,000 by the middle of 1963. If only 1960 Census figures for Keyport are considered, the population of Matawan Borough, Matawan Township, and Keyport

exceeded 27,500 by the middle of 1963. Such totals are far different from the 5,097 population assumed by the Examiner and the Review Board when comparing the communities of Juniper and Radio Elizabeth. The prejudice to Jupiter is obvious.

It has been five and a half years since the hearing at which any population evidence was presented. It is inconceivable that new home construction in the Matawan area ceased with the hearing in 1963. It is respectfully submitted that the Court should remand this case with instructions to the Commission to have the record brought up-to-date to reflect present day conditions.

C. Consideration of Jupiter's Section 307(b)
Community As Only Matawan Borough Was
Arbitrary And Capricious

Although the Examiner stated on the very first day of the hearing that he would receive and consider only evidence concerning Matawan, he never indicated whether he meant the Borough or the Township. (See footnote 25, above.) Subsequent rulings upon offers of evidence did not indicate any distinction between the Borough and the Township. Findings of fact in paragraphs 6, 8, 9 and 13 of the Initial Decision included facts concerning both the Borough and the Township. (A. 8-10.)

However, as noted previously, the conclusions of the Initial Decision (A. 23-24), the first Decision ^{27/}, the Supplemental Initial Decision (R. 2967), and the Supplemental Decision (R. 3024) under the Section 307(b) issue were based upon only Matawan Borough.

The basis for the conclusion that Jupiter's community, for purposes of making the choice under Section 307(b), is only Matawan Borough is not known. As shown above, Jupiter's application made no distinction between the Borough and the Township, and the Examiner received evidence and made findings of fact concerning both the Borough and the Township. Even if Jupiter's community would be considered as the two Matawans with a 1960 population of 12,456, the 59.9% reduction by consideration of ^{28/} only Matawan Borough was most prejudicial.

27/ Although the Review Board did not state in its first Decision that it considered Jupiter's community to be only Matawan Borough when making the Section 307(b) choice, it did deny Jupiter's Exception No. 41 (R. 882), which was directed to the conclusion of the Initial Decision that Jupiter's community was just Matawan Borough, with the explanation "Denied as not of decisional significance." (A. 45.)

28/ If Keyport also is considered as part of Jupiter's community, the reduction would be 73%. The arbitrary, capricious, and prejudicial effect of such reductions is illustrated by a 59.9% reduction of the population of Elizabeth to 43,187 persons, and a 73.0% reduction to 29,079. Radio Elizabeth most certainly would "yell foul."

It is respectfully submitted that the case should be remanded to the Commission with instructions to determine the composition and size of Jupiter's community.

II

THE DISTANCE AND RELATIONSHIP OF MATAWAN AND ELIZABETH TO NEW YORK CITY AND NEWARK SHOULD HAVE BEEN CONSIDERED UNDER THE SECTION 307(b) ISSUE

A. The Findings of Fact Were So Incomplete And Misleading As To Be Arbitrary and Capricious

The map facing page 11, above, will be of assistance in following this discussion.

The uncontradicted evidence proves the following: (1) Matawan Township and New York City's Richmond Borough are about 3.5 airline miles apart at their closest points and are separated by Raritan Bay across which there are no bridges or tunnels; (2) although the airline distance between the centers of Matawan Borough and New York City's Manhattan Island is about 29 miles, travel between the two by car, bus or train is by a circuitous route of approximately 45 miles (Jupiter Ex. 3, pp. 2-3; Ex. 4, p. 1); (3) although the airline distance between the approximate centers of Matawan Borough and Newark is about 21 miles, the distance by car, bus or train is about 35 miles; (4) that

Elizabeth is contiguous to and south of Newark and is contiguous to and west of New York City's Staten Island, being separated from the latter by a narrow body of water known as Arthur Kill which is spanned by the Goethals Bridge; (5) that Elizabeth is but 14 miles by car, bus or train from the center of Manhattan Island. (Radio Elizabeth Ex. 1, pp. 2,6); (6) that Matawan Borough, Matawan Township, and Keyport be outside any and all urbanized and metropolitan areas established by the Bureau of the Census; (7) that Elizabeth lies within the New York-Northeastern New Jersey Urbanized Area, the Newark Standard Metropolitan Statistical Area, and the New York-Northeastern New Jersey Standard Consolidated Area as defined by the 1960 Census; and (8) that the largest city in the area, except for New York City, is Newark, with a population in 1960 of 405,220.

It is well settled that one of the comparisons which must be made in a hearing requiring a Section 307(b) choice between mutually exclusive applications is the distance and relationship of each applicant's community to the larger centers of population. For example, the quotation on page 31, above, from the 1940 decision in Times-Star Publishing Co., supra, clearly shows that the comparison of the distances from Palo Alto and Alameda

to Oakland and San Francisco was a most important consideration in the grant of the more remote Palo Alto application. Other cases in which distances were compared under a Section 307(b) issue are too numerous to mention.

In spite of long established case precedent, both the Examiner and the Review Board not only ignored uncontradicted evidence but made and relied upon grossly misleading findings of fact concerning the distances and relationship of Matawan and Elizabeth to New York City and Newark. In the Initial Decision, the only finding concerning the distance from Matawan to New York City and Newark was as follows: "Matawan is approximately 4.2 miles from the nearest city limit of New York City, of which approximately three miles are over water."

(A. 8.) Jupiter Exception No. 13, which requested additional findings that the land distance to New York City's Manhattan Island from Matawan is approximately 45 miles although the airline distance was only about 25 miles, and that the land distance from Matawan to Newark is about 35 miles although the airline distance is but 21 miles (R. 861), was "Denied as not of decisional significance." (A. 45.) The grossly incomplete findings of the Examiner were repeated in paragraph 6 of the Decision. (A. 30.)

But that was not all! In his Initial Decision, the Examiner made only the following finding concerning the distance between Elizabeth and New York City: "It is approximately 14 miles from New York City and fronts on the Arthur Kill (Staten Island Sound) and Newark Bay. Elizabeth is connected to Staten Island by the Goethals Bridge." (A. 14.) The Review Board adopted the first sentence but omitted the second from its first Decision. (A. 31.)

The distances one must travel to reach Newark and New York City from Matawan are of the utmost importance because the closest stations providing primary service signals to Matawan are located in those cities.

The Review Board "brushed off" and denied Jupiter's Exception No. 39, which requested comparative consideration of the distances under the Section 307(b) issue (R. 882), by a brief reference in paragraph 34 of the Decision, to the fact that "Neither Matawan nor Somerville is close to or readily accessible to a large city, and it may therefore be assumed that they are of importance to their adjacent areas," and by a further brief reference in paragraph 35 to the fact that "It is contended, however, on behalf of the Matawan applicant, that the distance between Matawan and New York City, though less than five miles by air, is some fifty miles by road." (A. 42.)

However, neither of those paragraphs contained the comparison required by Section 307(b).

Although the Supplemental Initial Decision did contain a finding in paragraph 11 that Matawan "is 45 miles by highway from Raritan Bay to Manhattan Island," the Examiner again fell into the earlier practice of ignoring highway distances when he found that "Matawan is 14.3 miles south of Newark's city limits." (A. 57.) But even that latter distance was grossly in error. As is clear from the map facing page 10, above, the airline distances between the closest boundaries of Matawan Township is 17 miles and Matawan Borough is 19 miles. Obviously, the highway distance is much greater because of the intervening bodies of water.

It is crystal clear that the failure to make accurate and complete findings of fact concerning the distances from Matawan to New York City and Newark was either intentional or careless. In either event, the failure to make adequate findings was arbitrary and capricious. For this reason alone, the case should be remanded to the Commission with instructions that all relevant and material evidence must be reflected in the findings of fact and considered in making the comparison required by Section 307(b) of the Act.

B. Had All Relevant And Material Facts Been Considered, A Most Significant Preference Would Have Been Awarded To Jupiter

The quotation on page 28, above, from the decision in Northwestern Ohio Broadcasting Corporation, supra, states, in effect, that the weight to be given to various comparative criteria under Section 307(b) will vary from case to case. Jupiter agrees. The significance of the remoteness of one of the communities to the larger cities in which the broadcast stations serving the area are situated is apparent from the earlier quotations from Times-Star Publishing Co. and Northwestern Ohio, supra.

No such meaningful comparison was made in this case by either the Examiner or the Review Board. It is clear from the uncontradicted facts that Jupiter must be awarded a most significant preference over Radio Elizabeth in this area of comparison under the Section 307(b) issue, including the remoteness from existing stations and the lack of program service by existing stations when compared with Elizabeth, the ultimate conclusion could only have been that Section 307(b) of the Act compels the grant of Jupiter's application.

The remand should include instructions that full and complete consideration be given to each and every comparative criteria required by Section 307(b).

III

THE ACCESSIBILITY OF EXISTING STATIONS
FROM ELIZABETH AND MATAWAN NEVER WAS
COMPARED AS REQUIRED BY SECTION 307(b)

The accessibility of existing stations always has been one of the comparative criteria in any choice between communities pursuant to Section 307(b). Times-Star Publishing Co., supra. Neither the Examiner nor the Review Board made any meaningful comparison of the accessibility of existing stations from Matawan and Newark.

There was absolutely no comparison of the accessibility of existing stations from Matawan and Elizabeth in the first Initial Decision. In fact, there was not even mention of existing stations in the findings of fact concerning the size and characteristics of Jupiter's community, paragraphs 6 to 13, inclusive (A. 8-10), and Radio Elizabeth's community, paragraphs 22 to 32, inclusive. (A. 14-17.) In the findings concerning the availability of primary service signals to the two communities, paragraphs 34 and 40 (A. 17, 19), the call signs and locations of the stations were not given. The only reference in the conclusions to existing stations is in paragraph 22 (A. 22), where the following statement is made when the number of reception services (primary service signals) to each community was being compared: "Most

of the service in each case comes from radio stations in New York or northern New Jersey."

Jupiter Exception No. 13 requested, inter alia, a finding that the two stations closest to Matawan are in Eatontown and Asbury Park, New Jersey. (R. 861). Jupiter Exception No. 21 requested a finding that: "Though Elizabeth does not have a standard broadcast station, the following standard broadcast stations are licensed to nearby New Jersey communities: WJRZ, WNJR and WVNJ, Newark; WPAT, Patterson; WERA, Plainfield; WMTR, Morristown; and WCTC, New Brunswick." (R. 868). Both exceptions were "Denied as not of decisional significance." (A. 45.)

Even though it had concluded that the location of stations closest to the two communities was "not of decisional significance" and refused to make the requested findings of fact, the Review Board did refer to Jupiter's argument that the accessibility of the three Newark stations from Elizabeth be considered. The Board disposed of the argument by reference to Star of the Plains Broadcasting Company v. Federal Communications Commission, 105 U. S. App. D.C. 352, 267 F. 2d 629 (1957), and by then stating that fulfillment of Elizabeth's needs by the Newark stations could not be presumed and no evidence of their program service

had been presented. (A. 40-41.)

But that was only a part of Jupiter's contention and most certainly was not the comparison of accessibility of existing stations required by Section 307(b). Star of the Plains did not and does not negate the meaning of the term "radio service" as used in Section 307(b) and the necessity for a comparison of accessibility of stations.

8. . . . We have also evaluated the evidence adduced during the remand proceeding in conjunction with that adduced during the original hearing pursuant to the standard Section 307(b) issue and find no valid reason to depart from our earlier determination that Elizabeth's need for a first local outlet for self-expression is greater than that of Matawan or Somerville and that a grant of Radio's application would best serve the public interest, convenience and necessity. (A. 118; footnote omitted.)

There is not a single affirmative statement in any one of the four decisions which proves that the accessibility of the three Newark stations from contiguous Elizabeth and 35 mile distance Matawan ever was compared as required by Section 307(b). Because this most crucial of all criteria under Section 307(b) never was given comparative consideration, this case must be remanded to the Commission with instructions that the required comparison be made.

IV

THE SERVICE, BOTH TECHNICAL AND PROGRAM,
PROVIDED THE COMMUNITIES BY EXISTING
STATIONS WAS NOT COMPARED AS REQUIRED
BY SECTION 307(b)

As noted above, the Review Board stated as follows in its first Initial Decision:

33. Jupiter also appears to contend that Elizabeth's needs for a local outlet are met by the three stations in Newark. This contention rests upon the fact that the studios of these stations, though located in Newark, are readily accessible to the residents of Elizabeth. The proximity of the Newark stations to Elizabeth does not, in and of itself, detract from the presumption that Elizabeth needs a first local outlet. See Star of the Plains Broadcasting Company v. FCC, 267 F.2d 629, 18 RR 2072 (1957). Absent evidence to the effect that the Newark stations' programming meets Elizabeth's needs for a local outlet, it cannot be assumed that Elizabeth's need for a local outlet has been satisfied. No such evidence was presented in this case, and hence, under Star of the Plains, it cannot be presumed that Elizabeth's need for a first local outlet is reduced by the proximity of the Newark stations. (A. 40-41.)

It might be said that Jupiter and Somerset County "called the Board's bluff" by presenting, at the second hearing, extensive evidence concerning the program service the Newark stations provide for Elizabeth and additional evidence concerning the program service rendered by all stations which provide primary service signals to Elizabeth and Matawan. Although that evidence was

considered under the new 307(b) Suburban Policy issues, it was not considered under the comparative criteria of the Section 307(b) issue. In other words, once the Examiner and the Board concluded that both Radio Elizabeth and Jupiter had satisfactorily met the 307(b) Suburban Policy issues and rebutted the presumption that their applications should be considered as being for New York City, no further consideration was given to the program evidence. The Commission has been caught in a trip of its own making. The Commission's Memorandum Opinion and Order granting the applications for review of Jupiter and Somerset County and ordering the further hearing on the 307(b) Suburban Policy issues did not limit or prohibit reconsideration of the Section 307(b) conclusions in light of the additional evidence developed. (A. 47-51.)

A. Matawan Would Have Been Preferred In Any
Comparison Of Program Service Provided The
Communities By Existing Stations

There is no question that both Elizabeth and Jupiter's community, whether it be Matawan Borough or some larger area, have a need for the station each applicant proposes. Section 307(b) requires a comparison of each of a number of elements or criteria to determine which community has the greater need.

One of the criteria is the accessibility of existing stations which, if called upon, are capable of fulfilling at least some of those needs.

The evidence shows that the only service ever rendered by existing stations for or on behalf of any Matawan organizations has been the broadcast of school closing announcements during inclement winter weather by Station WOR and an occasional announcement on behalf of a church organization provided the request was submitted some weeks in advance. The evidence proves that the closest stations to Matawan which provide useable signals (primary service) are located 35 land miles away in Newark, and the other stations providing such signals are 45 highway miles away in New York City. By no stretch of the imagination can they be said to be reasonably accessible to or from Matawan.

By comparison, the evidence conclusively proves that the three Newark stations, in varying degrees, have been called upon by officials of the City of Elizabeth and organizations of that city for service and have responded. The testimony of Mayor Dunne, summarized on pages 19 and 20, simply cannot be ignored. Nor can the examples of how the stations have responded to requests for service from Elizabeth organizations, summarized in Appendix A, be ignored.

The Commission and Radio Elizabeth, in their briefs, undoubtedly will point to the findings of the Examiner concerning the needs of Elizabeth which were set forth in paragraphs 69 to 77, inclusive, of his Supplemental Initial Decision (A. 80-86) to support a contention that there is a significant need for a first station in Elizabeth. But that is not the present question. The question is, are the existing stations sufficiently accessible to be capable of fulfilling at least some of the needs of Elizabeth? If so, then a comparison with the accessibility of stations to and from Matawan must be weighed.

There is not one sentence in any of the four decisions which even hints of such a comparison. In fact, as noted in the quotation from the first Decision of the Board on page 55, no such evidence was considered up to the issuance of that Decision.

Any comparison of the accessibility of existing stations to and from Elizabeth and Matawan, and the capability of the closest stations to provide some program service for each community, can lead only to the awarding of a most significant preference for Jupiter's community.

Inasmuch as the Commission failed to make this most crucial comparison as required by Section 307(b), the case must be remanded to the Commission with appropriate instructions.

B. Matawan Should Have Been Preferred In Any Comparison Of Technical Service Provided The Communities By Existing Stations

The number of listenable signals, i.e., reception service, available to Matawan and Elizabeth are almost identical and, except in two or three instances, the signals are provided by the same stations.

Frequent reference has been made in this brief to the Commission's 1949 decision in Times-Star Publishing Co., supra, rather than to more recent decisions such as Radio Crawfordsville, Speidel, supra, and others. The reason for reliance upon Times-Star is that the rationale of that case has never been questioned in the many cases which have followed, while the rationale of Radio Crawfordsville, Speidel, Monroeville, and others have been seriously and understandably questioned.

The quotation on page 31, above, from Times-Star establishes that the location of stations which provide reception service to the communities is of some significance and must be compared. The quotation on page 27 from the 1950 report concerning the Origination Point of Programs of Broadcast Stations and the quotation on page 28 from Northwestern Ohio lend support.

The Examiner, in paragraph 22 of his first Initial Decision, concluded as follows: "Most of the service in each case comes

from radio stations located in New York or Northern New Jersey. The result is that no preference can be accorded to either of the applicants on this point because of the abundance of reception service to the three communities." (A. 830; Emphasis supplied.) Those conclusions were adopted by the Review Board in paragraph 25 of its first Decision (A. 32-33.)

Had the locations of the stations which provide reception service to the communities been compared as required by Section 307(b), Jupiter's community would have been awarded a significant preference over Elizabeth.

But the Commission may answer that any such preference would be insignificant. How can that conclusion be reached until after the comparison has been made. Even though the preference for Jupiter in this comparative criteria may be entitled to much less weight than preferences in other comparative criteria, nevertheless, it is entitled to some weight, Northwestern Ohio Broadcasting Corporation, supra.

The Commission should be instructed to reexamine its conclusions comparing reception services in light of the locations of the stations providing such services.

V

THE TECHNICAL PROPOSALS OF THE APPLICANTS
SHOULD NOT HAVE BEEN CONSIDERED WHEN COM-
PARING THE NEEDS OF THE COMMUNITIES FOR
THEIR FIRST BROADCAST STATION

Every identifiable community, i.e., a grouping of persons with common interests, has some need for its own broadcast station to provide an outlet for local self-expression, which includes news as well as other program service. When mutually exclusive applications propose to establish stations in separate and distinct communities, the needs of each community for a first (or an additional) station first must be ascertained and then compared with the needs of each of the other communities.

The needs exist irrespective of the proposals of the applicants. Only after the needs of one community have been found to be greater than those of the other communities may the technical proposal be examined, and then only for the purpose of ascertaining whether the proposal satisfies the various technical rules and standards. If this is not true, then the needs of communities could be controlled by the applicants.

In paragraph 22 of the conclusions of the Initial Decision (A. 21), when considering the Section 307(b) issue and choice,

the Examiner stated that "As all three proposals can be regarded as local in nature, it is clear that none of them would provide substantial coverage to the New York-Northeastern New Jersey Urbanized Area." In paragraph 25 of the Decision (A. 32-33), the Board stated that "It was the Examiner's premise that each of the proposals must be considered 'local in nature', i.e., for Elizabeth, Somerville, and Matawan." Jupiter's Exception No. 40 (R. 882) to the Examiner's conclusion was "Denied. The conclusion is adequately supported by findings." (A. 46.) The only possible findings related to or were based upon the technical proposals of the applicants. In paragraph 8 of the Supplemental Decision, the Board affirmed its earlier conclusion that Radio Elizabeth's proposal "would in fact be, a local transmission service for Elizabeth, New Jersey." (A. 118.) It thus appears that the weight given to the needs of Elizabeth when making the comparison required by Section 307(b) were predicated, in part, upon the technical proposal of the applicant.

Although this error may not be as readily apparent as those already discussed, it is respectfully submitted that it is sufficiently substantial and prejudicial to warrant consideration in this appeal.

VI

THE CONCLUSIONS REACHED UNDER THE 307(b)
SUBURBAN POLICY ISSUES SHOULD NOT HAVE
BEEN CONSIDERED UNDER THE SECTION 307(b)
ISSUE

The purpose of the 307(b) Suburban Policy is to permit realistic consideration of an application for a suburb of a major city which is mutually exclusive with an application for another community. In some instances, it appeared that applicants specified populous suburban communities without a station so as to gain a Section 307(b) preference over an applicant for an additional station in a more populous community or for a first station in a much smaller community. Typical examples are the Huntington, Speidel, and Monroeville cases, supra. In other instances, the suburban community was specified in a good faith effort to satisfy a need for a station in the suburban community. Typical examples are the Times-Star, Radio Crawfordsville, and Radio Haddonfield cases, supra.

Although Jupiter has not placed in issue the legality of the 307(b) Suburban Policy, it has questioned its application in determining the composition, size, characteristics, and needs of the suburban community for its first station. Had the Commission, in Radio Crawfordsville, Speidel, Monroeville

and other cases, followed the well established precedents of the Northwestern Ohio, Times-Star and Huntington cases, the necessity for a policy such as the 307(b) Suburban Policy would never have arisen.

From the very start of this case Jupiter has argued that the relationship of Elizabeth to Newark had to be considered under the Section 307(b) issue. It is apparent from the first Decision of the Board, the Supplemental Initial Decision of the Examiner, and the Supplemental Decision of the Board that, once the conclusion had been reached that Radio Elizabeth's application should not be considered as one for Newark for purposes of making the choice under Section 307(b), that they then considered Elizabeth as though divorced, isolated or remote from Newark. If this was not so, what other explanation is there for the failure to compare the accessibility of the Newark stations from Elizabeth with their accessibility from Matawan?

The request for remand is further supported by the manner in which the 307(b) Suburban Policy was applied when making the basic choice required by Section 307(b) of the Act.

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that the Decision of the Federal Communications Commission granting the application of Radio Elizabeth, Inc., for a new station at Elizabeth, New Jersey, and denying the mutually exclusive application of Jupiter Associates, Inc., for a new station at Matawan, New Jersey, should be reversed and remanded to the Commission for further consideration.

Respectfully submitted,

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October 31, 1968

Program Service of Newark
Stations For Elizabeth

Following the remand for a further hearing upon the 307(b) Suburban Policy issues, Radio Elizabeth submitted written interrogatories to the various stations which provide primary service signals to Elizabeth in an attempt to elicit facts to meet Issue (a)(2) concerning the extent to which the needs of Elizabeth for radio service were being met by existing stations. The interrogatories were mailed to the stations on or about August 1, 1966, and requested that replies be submitted on or about September 1, 1966. The questions related to a considerable extent to the program service of the station during a representative period. Instead of agreeing to receipt in evidence of the replies, Somerset County insisted on its right to cross-examine the respondents. Responsible officials of the three Newark stations testified in Washington on November 21, 1966, in response to subpoenas issued at the request of Somerset County. Because the testimony was based upon material prepared in response to the written interrogatories, the dates of some programs were some weeks prior to the date of the testimony. The testimony of each of the three witnesses established that none of the stations maintained records of sufficient detail to depict with any degree of accuracy the service rendered by or on behalf of Elizabeth organizations.

Station WNJR

Although the music broadcast by Station WNJR is of particular interest to the Negro audience, the overall program service is considered by the station to be of general interest. (Tr. 1581-1582). Heavy emphasis is placed upon religious programs, and moderate emphasis is placed upon news and public affairs programs. (Tr. 1582).

The news and program departments of Station WNJR maintain contact with representatives of Elizabeth organizations for the presentation of programs and public service announcements. During a representative period, the following spokesmen for Elizabeth organizations appeared on news programs of WNJR:

June 24, 1966 - Hubert Barbour detailed some housing complaints his office had received.

July 6, 1966 - Rev. Watts spoke on a matter involving Negro representation on city agencies.

July 14, 1966 - Captain Long of the Elizabeth Police Department commented on a story.

July 18, 1966 - A nine-year old boy who survived a fall was interviewed.

On August 1, 2, 3, 1966, Mayor Dunne addressed himself to items concerning federal funds and urban renewal.

August 4, 1966 - The Human Rights Commissioner of Elizabeth announced a series of meetings to improve relations with police.

August 15, 1966 - Rev. L. Watts of Elizabeth NAACP spoke on job discrimination.

August 15, 1966 - A representative of the Elizabeth Police Department commented on a recent hijacking.

August 19, 1966 - Rev. L. Watts spoke to support a wide range of improvements in housing, etc.

August 19, 1966 - The Executive Director of the Human Relations Commission Office of Elizabeth, Hubert Barbour, urged compliance with the Fair Housing Act.

August 19, 1966 - Rev. L. Watts of the Elizabeth NAACP appeared on a news program supporting a program of Housing, Education, Sports and Parks.

August 22, 1966 - The Post Commander of Post 6 of the American Legion of Elizabeth called for censorship of a Rutgers professor.

August 25, 1966 - Two Elizabeth patrolmen reported on a rescue from a burning apartment.

September 21, 1966 - Students of Jefferson High School, Elizabeth.

(Tr. 1590-1592).

Station WNJR maintains bi-weekly contacts with civic organizations in Elizabeth and to keep apprised of the need for public service announcements. (Tr. 1599). WNJR broadcast 14 public service

announcements on behalf of Elizabeth groups and organizations during the week preceding receipt of the Radio Elizabeth interrogatories. (Tr. 1592). However, WNJR has carried as many as 50 public service announcements a week for Elizabeth organizations. (Tr. 1592-1615).

Station WNJR broadcasts two weekly public affairs programs, entitled "New Jersey Highlights" and "Perspective". These programs are devoted to topics specifically related and local to Elizabeth on the following dates and in the following manner:

James S. Wilson, director of the Union County Anti-Poverty Council appeared September 6, 1966, to discuss the anti-poverty program as it affects Elizabeth.

Reverend J. B. Crowell, pastor of the Hope Memorial Church in Elizabeth appeared on September 23 and 30 to discuss the position of the Church on night harness racing in New Jersey. (Tr. 1586, 1588, 1606).

Station WVNJ

Approximately 20% of the total news time of Station WVNJ is devoted to local news, which includes activities and events in Elizabeth. Most of the news is obtained by the station from United Press International, who has a reporter assigned to the Newark area and who covers Elizabeth. In addition, news of Elizabeth is obtained from time to time from the parent organization, the Newark News, which maintains an office in Elizabeth. (Tr. 1620).

The policy of the station is not to refuse requests for the broadcast of public service announcements by or on behalf of Elizabeth organizations. (Tr. 1620-1621).

Because WVNJ is a regional station, its educational programs are directed to the entire area rather than just to Newark, Elizabeth, or any other community. (Tr. 1621).

With respect to public affairs programs, the witness could recall the receipt of any requests for the presentation of topics specifically related and local to Elizabeth. (Tr. 1622).

The scores of athletic contests in which Elizabeth schools participate are included in local sports programs. (Tr. 1624).

Station WVNJ broadcasts a 30 minute discussion program each week, titled "In the Public Interest". Although the witness had no recollection of any programs presenting guests from or topics concerning Elizabeth, he was certain that some had been broadcast. (Tr. 1625).

In an effort to ascertain the interests and desires of the public for programming, the station contacted 219 organizations in January of 1966, of which 22 were in Elizabeth. (Tr. 1626-1627).

Station WJRZ

Station WJRZ has two full time reporters to gather local news, principally in Essex, Union, Bergen and Hudson Counties of New Jersey. (Tr. 1632-1633). Contacts at least weekly are made with the Elizabeth

city officials and police. (Tr. 1648). From 15 to 20% of the local news broadcast by the station is news of Elizabeth and news of interest locally in Elizabeth. Included in the percentages was public service time devoted to Elizabeth. (Tr. 1632-1633).

During a seven day period immediately preceding receipt of Radio Elizabeth's written interrogatories, approximately 200 public service announcements were broadcast, including one on behalf of St. Elizabeth's Hospital Benefit in Elizabeth. Although the witness had no records available, he believed the ratio was not representative for the past year. (Tr. 1634).

One of the regularly scheduled public affairs programs, "Up Date", has presented both the former Mayor and the present Mayor of Elizabeth. (Tr. 1638).

The names of 18 organizations engaged in business were listed as advertisers on Station WVNJ. During the last year, broadcasts had been originated by the station from at least three of the stores in Elizabeth. (Tr. 1641).

Summary Of Program Service Of
New York City Stations For Elizabeth

Repeated reference was made in the testimony of executives of the New York City stations which provide primary service signals to Elizabeth to the 17 or 18 county metropolitan area. The 1960 Census of Population, Volume I, Characteristics of the Population, Part A, Number of Inhabitants, page 34-30, shows the New York-Northeastern New Jersey Standard Consolidated Areas is made up of the New York, Newark, Jersey City, and Patterson-Clifton-Passaic Standard Metropolitan Statistical Areas plus Middlesex and Somerset Counties, in New Jersey. By reference to pages 32-22 and 34-29 of the same publication, it is determined that the following counties are encompassed in the Standard Consolidated Area: in New York State, Bronx, Kings, New York, Queens, Richmond, Nassau, Rockland, Suffolk and Westchester Counties, a total of 9; and in New Jersey, Essex, Morris, Union, Hudson, Bergen, Passaic, Middlesex and Somerset Counties, a total of 8.

Radio Station WNBC, New York City, directs its primary programming efforts to the 18-county area included within the New York Metropolitan area as defined by the United States Census. (Radio Elizabeth Ex. 300-3, pp. 3-4). The station believes it is obligated to serve the needs of Elizabeth as it is to serve the needs of all other municipalities in the New York Metropolitan Area with consideration to the population of the community in its relative distance

from the heart of New York City. (Radio Elizabeth Ex. 300-3, pp. 5-6). The facilities of WNBC are available for broadcast of school closings and religious programs within its primary service area, including Elizabeth. (Radio Elizabeth Ex. 300-3, pp. 11-12). In fact, five schools in Elizabeth, Bender Memorial Academy, St. Adalbert School, St. Catherine's School, and St. Patrick's High and Grammar Schools have used the facilities of Radio Station WNBC for broadcasting of emergency closing announcements during inclement weather. (Radio Elizabeth Ex. 300-3, pp. 33-35).

Radio Station WCBS, New York City, indicated that it regards as its primary service area the standard Metropolitan Statistical Area of New York, including Union County and Elizabeth, New Jersey. (Radio Elizabeth Ex. 300-5, pp. 15-16). It is station policy to originate news from Elizabeth if there is a story of sufficient importance. (Radio Elizabeth Ex. 300-5, p. 26). Radio Station WCBS carries, as a part of regular news coverage, news of traffic along all of the major arteries flowing in and out of New York City, including those that pass through or near Elizabeth. (Radio Elizabeth Ex. 300-5, pp. 33-34).

Radio Station WNEW, New York City, directs its service principally to 18 counties, including all of Union County and specifically Elizabeth, (Radio Elizabeth Ex. 300-2, p. 9). The station tries to serve everyone within that area (ibid, p. 10). To obtain

local news of Elizabeth, WNEW uses the Associated Press, United Press International, as well as the New York Metropolitan Wire and the New Jersey Wire, which originates in Newark. The New Jersey Wire provides WNEW with news relating to Elizabeth, and the station uses the stories when it deems appropriate. Station WNEW also uses the "radio wire" and the "A" wire, which includes news of Elizabeth, New Jersey. WNEW also subscribes to the sports wire from UPI, which includes sports events from Elizabeth. (Radio Elizabeth Ex. 300-2, p. 9-12). The station may use information obtained therefrom for reference material and for rewriting and source material for the station's own development of news stories. (Radio Elizabeth Ex. 300-2, p. 31). Station WNEW does not favor or discriminate against any of the fifty or so communities within the 18-county area (including Union and Somerset Counties) which it considers to be its primary service community. (Radio Elizabeth Ex. 300-2, pp. 32-A-33). The station broadcasts school closing announcements for communities including Elizabeth (ibid, pp. 34-35)

Radio Station WINS, New York City, has carried political broadcasts by candidates for state or federal office which include the Elizabeth area. (Radio Elizabeth Ex. 300-1, p. 42). WINS considers its primary area to be the New York Metropolitan Area, as defined by the United States Census, including the city of Elizabeth, New Jersey. (Radio Elizabeth Ex. 300-1, p. 49-50). It is the policy

of the station not to discriminate between any of the communities within what it considers to be its primary service area, with due regard to population and its distance from New York City. (Radio Elizabeth Ex. 300-1, p. 51). WINS considers news originating in Somerville and Elizabeth to be local news. (Radio Elizabeth Ex. 300-1, p. 52). The station subscribes to the AP wire known as the "New Jersey Wire", which originates in Newark, and which, for purposes of WINS, carries news of the five New Jersey boroughs located in what WINS considers to be its primary service area (ibid, p. 53-54). WINS carries announcements concerning school closings by county in the State of New Jersey to which orients its service (ibid, p. 59). The station broadcasts regional weather forecasts in which New Jersey is included (ibid, p. 67).

Radio Station WHN, New York City, orients its public affairs programming towards the Greater New York Area and the counties of Westchester, Rockland, New York; Nassau and Suffolk, Long Island, New York; Bergen, Hudson, Union, Passaic, Middlesex, Morris, Somerset, and Essex, New Jersey; and Fairfield, Connecticut. The entertainment program of WHN is designed to serve all persons within its primary service area who desire to serve the type of program service provided by the station. (Radio Elizabeth Ex. 100-20, p. 3). The station has carried announcements concerning school closings in Elizabeth. (Radio Elizabeth Ex. 300-14, pp. 13-14).

Radio Station WABC, New York City, considers the following counties in New Jersey to be among those within its primary service area: Essex, Morris, Union, Bergen, Middlesex, Somerset, Hudson, and Passaic. Monmouth County is not included in this listing. (Radio Elizabeth Ex. 300-16, p. 7). The station determines the major portion of its music played list by a weekly telephone poll of retail record stores in the primary coverage area. The sales are analyzed and arranging is set up through popularity of tunes based on public acceptance through purchase of individual selections. About fifty stores per week are called on a rotating basis out of a total of 525 stores, among which are record stores located in Elizabeth and Somerville; there is no clear indication that any of these record stores are located in Matawan. (Radio Elizabeth Ex. 300-16, pp. 11-12). Station WABC has carried information concerning school closing announcements and other emergencies in Elizabeth. (Radio Elizabeth Ex. 300-16, p. 23).

Radio Station WPOW, New York City, has a programming format designed to serve foreign language groups, German, Polish, Czech, Greek, Ukranian, and minority religious communities with English broadcasting. (Radio Elizabeth Ex. 300-17, p. 4). The station has carried public service announcements concerning Elizabeth groups. (Radio Elizabeth Ex. 300-17, p. 14). The station has

carried programming on behalf of churches in Elizabeth. (Radio Elizabeth Ex. 300-17, p. 33).

Radio Station WEVD, New York City, broadcasts during daytime operation in German, Greek, Italian, Jewish, Hebrew, Gallic, Lithuanian, Japanese, Polish, Russian, Scandinavian, Ukranian, and English (Radio Elizabeth Ex. 300-7, p. 7). It is station policy to carry public service announcements requested by groups in Elizabeth. (Radio Elizabeth Ex. 300-7, p. 13). In fact, the station has carried at least one such announcement, on behalf of the Jewish Education Center of Elizabeth, New Jersey (Radio Elizabeth Ex. 300-7, p. 15). The Jewish Education Center in Elizabeth, New Jersey, presents a 1/2 hour religious program on the station every Saturday from 9:00 AM to 9:30 AM (Radio Elizabeth Ex. 300-7, p. 16). During the year preceding the taking of a deposition by a representative of WEVD, there had been two remote broadcasts of religious programs from Elizabeth. (Radio Elizabeth Ex. 300-7, p. 36).

Radio Station WLIB, New York City, orients its programming to the Greater Metropolitan Area of New York, including Elizabeth, Newark, and the following counties in New Jersey: Essex, Morris, Union, Bergen, Middlesex, Somerset, Hudson, and Passaic. (Radio Elizabeth Ex. 300-10, p. 5-6). The station carries a programming format which is directed primarily to the Negro audience and to a

lesser extent to Spanish-speaking listeners and chooses its programming material, including news, with a view toward the need and interest of these audiences for such program material.

(Radio Elizabeth Ex. 100-15, p. 2).

Radio Station WHOM, New York City, specializes in Spanish language broadcasts. The station broadcasts no English language programs at all. WHOM directs its program format to that portion of the Greater New York Area in which Spanish-speaking people reside; the greatest proportion of these live in Manhattan, Bronx, and Brooklyn, but there is a concentration of Spanish-speaking people in Northern New Jersey, in Bergen, Passaic, Hudson, Essex, and Union Counties. The station does devote a small amount of time to broadcasting current local news related to Elizabeth, New Jersey (Radio Elizabeth Ex. 300-10, p. 1-6).

Radio Station WMCA, New York City, has carried public service announcements for Elizabeth organizations. Recent examples were announcements of a dance held at St. Mary's High School in Elizabeth, and a meeting of Aggrin Temple in Elizabeth. WMCA carried information as to school closings of Alphonse College in Woodcliff, and St. Dominic's Academy in Elizabeth. (Radio Elizabeth Ex. 300-10, p. 18).

Radio Station WQXR, New York City, considers those counties in New Jersey closest to New York City among the principal communities

to which the station directs its service. (Radio Elizabeth Ex. 300-13, p. 5-6). The program service of WQXR is designed to be of interest to listeners generally in its service area, rather than any one particular segment thereof. (Radio Elizabeth Ex. 300-13, p. 10). The station traditionally has been devoted to presentation of classical music and semi-classical music and semi-classical music with New York Times news bulletins on the hour, and has received mail response from communities within its service area, including Union County, within which Elizabeth is located. (Radio Elizabeth Ex. 300-13, p. 24-25).

Excerpts
fromNewark Broadcasting Corporation
11 FCC 956, 3 Pike & Fischer RR 839, 853 (1947)

Petitioners have grounded their major contentions on Section 307(b) of the Communications Act; the claim is made both that we have misinterpreted the meaning of the provision, and that to the extent that we may have correctly construed the law, we have based our conclusions on inadequate findings of facts. The argument apparently is that Section 397(b) requires the Commission to make distribution of licenses among the several States and communities so as to provide a fair, efficient and equitable distribution of radio service, that radio service refers to radio reception only and does not include transmission, and that since the Newark area receives reception from nearly all of the New York stations, some of which actually have their transmitter sites in New Jersey, no basis for the preference of the Newark application over the New York applications can be grounded on Section 307(b). The history of the Communications Act, however, makes clear that petitioners' interpretation of the section is erroneous and that radio service in fact refers to transmission as well as reception, and includes consideration of the sources from which the programs are received, as well as number of stations which can be heard. The present language of Section 307(b), as amended in 1936, requires the Commission in licensing proceedings to make such distribution of licensee among the various States and communities as will "provide a fair, efficient and equitable distribution of radio service to each," -- the same language as appeared in Section 9 of the original Federal Radio Act of 1937. But while the present section no longer contains the definition of such "service" as pertaining to both "transmission and reception" which was included in the so-called Davis amendment to the Radio Act and which became part of the original Section 307(b) of the Communications Act of 1934, it is clear that this language in the Davis Amendment which dispelled the previous ambiguities as to the meaning of the term "radio service" in the Radio Act, serves equally to clarify the meaning of the identical phrase in the present Section 307(b). As the history of the repeal of the Davis Amendment makes clear, Congress intended only to eliminate the impractical mechanical device which had been set up for achieving such equality, leaving it to the discretion of the Commission to achieve equality on a case-to-case basis as a matter of its sound judgment and in the light of the relevant factors.^{1/}

^{1/} The "Davis Amendment", which was carried over from the Federal Radio Act, to which it was appended in 1928 (45 Stat. 373) was set forth in Sections 302 and 307(b) of the original Communications Act of 1934 (48 Stat. 1081, 1084). It established
(Cont'd on page 2).

five zones throughout the United States and required the Commission, with certain minor exceptions, to maintain an equal allocation of broadcast licenses, frequencies, power, etc. between the various zones and between the states in each zone according to their population to insure "equality of radio broadcasting service, both of transmission and of reception." The specific definition of radio service to include transmission as well as reception had been inserted in the Radio Act in 1928 at the time of the original passage of the Davis Amendment because, as Representative (now Senator) White stated, "It had been urged that broadcasting service meant simply reception. Now in order to bring about complete clarity we wrote in that this equality should consist both of transmission and reception." 69 Cong. Rec. 5120.

The Davis Amendment, however, soon proved to be impractical of enforcement. The mechanical rules designed to enforce geographic equality, led instead, due in part to the excessive size of the zones, to an increased concentration of stations in the heavily populated seaboard areas, and a consequent limitation of the number of stations serving the various rural and western areas of the country that the amendment had been designed to protect. Moreover, the rigid rules required by the amendment seriously restricted the optimum utilization of the available frequencies. These facts led first to the exemption from the zoning requirements of stations with a power of 100 watts or less, and finally in 1936 to the repeal of the "Davis Amendment and the adoption of a revised Section 307(b), which in effect, reenacted the pre-Davis Amendment provisions of the Radio Act of 1927."

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,145

JUPITER ASSOCIATES, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

RADIO ELIZABETH, INC.,
Intervenor.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE ^{*/}

Appellant Jupiter Associates, Inc. appeals from decisions of the Review Board of the Federal Communications Commission (A. 27-47, 110-128) which granted intervenor Radio Elizabeth, Inc. authority to operate a first local standard broadcast (AM) station in Elizabeth, New Jersey, and denied the mutually exclusive applications of Jupiter for Matawan, New Jersey, and Somerset County Broadcasting Company for Somerville, New Jersey. ^{1/} On June 19, 1968, the Commission denied review (A. 129) of the Review Board's

^{*/} All page references to appellant's brief refer to the typewritten copy; this was necessary because the briefs of the parties are being printed at the same time.

^{1/} Somerset has not sought review of these decisions and is not a party to this appeal.

decision.^{2/}

Each of the three applicants, Jupiter, Radio Elizabeth, and Somerset, sought a construction permit for a Class II standard broadcast station to operate daytime only on the frequency 1530 kilohertz in communities in northern New Jersey. Jupiter's and Radio Elizabeth's proposals for Matawan and Elizabeth, respectively, each sought 500 watts of power while Somerset's proposal for Somerville sought 100 watts. Since the applications were mutually exclusive, they were designated for hearing on September 11, 1962, to determine whether the applicants were qualified^{3/} and if so, in light of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b), which proposal would best provide a fair, efficient and equitable distribution of radio services.^{4/}

^{2/} Under Section 5(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 155(d)(3), in the absence of review by the Commission a decision of the Review Board has the same force and effect as a decision of the Commission.

^{3/} The issues considered related to the areas and populations which would gain service, interference each would cause and receive, and the availability of other services (A. 6-7).

^{4/} Section 307(b) states:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

After an extensive hearing the examiner in a decision released December 10, 1963, concluded that all three applicants were basically qualified and were therefore entitled to 307(b) consideration. In deciding which community should receive a preference under 307(b), the examiner concluded that since numerous reception services (a minimum of 9 or 10 at any given point)^{5/} were available to each community but none had a local transmission service, the "controlling factor here revolves around each respective community's need for transmission service" (A. 23)^{6/}. Initially, the examiner noted that Elizabeth was the third largest city in the United States without a local AM radio station (A. 23)^{7/}. He continued that, "while size cannot be construed necessarily as the dominant factor" each additional comparison was "overwhelmingly favorable" to Elizabeth. Thus he pointed out: Somerville and

^{5/} Matawan currently receives primary service (i.e., a listenable signal) from ten stations while the rural area which Jupiter proposes to serve receives primary service from a minimum of nine stations. Radio Elizabeth's service area currently receives ten primary signals. Most of this service is provided by New York City or northern New Jersey stations.

^{6/} In WSIX Broadcasting Station, 8 Pike & Fischer, R.R. 216, 217 (1952), the Commission defined transmission and reception service as follows: "Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable radio signal."

^{7/} The examiner found that Matawan's 1960 population was 5,097 persons, Somerville's was 12,458, while Elizabeth in 1960 had a population of 107,698. In addition, the examiner found that Jupiter would provide interference free service within its 0.5 mv/m contour to 498,024 persons, Somerset to 307,686, while Radio Elizabeth would provide interference free service to 1,488,774 persons in substantially the same area of coverage as Jupiter.

Elizabeth are county seats serving counties with populations of 143,913 and 504,255 persons respectively;^{8/} Elizabeth is a port city and the hub of greater business, industrial and manufacturing activities than the other communities; neither Somerville nor Matawan is comparable to Elizabeth in economic importance; Matawan has no Chamber of Commerce and only two civic organizations and two churches while Elizabeth has large numbers of each; in regard to the number of schools, banks, the police facilities and numerous other areas Elizabeth demonstrated greater community complexity and greater need (A. 22-25). For these reasons a grant to Radio Elizabeth was recommended.

The Review Board in reviewing the Examiner's decision adopted with some amplification his findings and conclusions. At the same time it discussed and disposed of Jupiter's contention that because Elizabeth adjoins Newark which has three standard broadcast stations it has less need for a local outlet than Matawan whose reception services are not nearby. The Review Board summarized its extensive answer to this contention as follows (A. 42-43):

The abundance of service available to Matawan underscores the weakness of the argument of the Matawan applicant that the reception needs of its community are not adequately met. Even granting that Matawan's location vis-a-vis the stations serving it is not as favorable as is the location of Elizabeth, it does not follow that it is underserved and is entitled to a degree of preference over Elizabeth insofar as its reception needs are concerned. A contention that a community, which receives service from

^{8/} Matawan is located in Monmouth County with a population of 334,401 but it is not the governmental center.

ten stations, is nevertheless significantly underserved (either in a comparative or in an absolute sense), can be given no credence in the absence of a record showing that the programming of the stations which provide a primary signal to that community does not in fact meet the reception needs of that community. As noted above, no such showing was made by the Matawan applicant.

Following the Review Board's decision the Commission ordered a supplemental hearing to determine in light of its new Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965) whether Jupiter's and Radio Elizabeth's proposals were realistically local, i.e. whether they were designed to serve their specified station locations or, in fact, the nearby larger cities. Each applicant successfully established that its application was local in nature, and the Review Board after evaluating the evidence adduced at the remand hearing along with the evidence received in the original hearing pursuant to the standard Section 307 (b) issue concluded that it could "find no valid reason to depart from [its] earlier determination that Elizabeth's need for a first local outlet for self-expression is greater than that of Matawan or Somerville . . ." (A. 118)

ARGUMENT

I. THE REVIEW BOARD PROPERLY CONCLUDED THAT A GRANT OF INTERVENOR'S APPLICATION FOR ELIZABETH, NEW JERSEY, WOULD BEST PROVIDE A "FAIR, EFFICIENT AND EQUITABLE DISTRIBUTION OF RADIO SERVICE" PURSUANT TO SECTION 307(b) OF THE COMMUNICATIONS ACT.

In F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358 (1955), the Court stated that implementation of Section 307 (b) which "empowers the Commission to allow licenses so as to provide a fair distribution among communities . . . is furthered by a recognition of local needs for a community mouthpiece." Allocations based on local needs, the Court went on to say, will ultimately "secure local means of expression." Implementation of this goal has long been held to be a matter solely within the Commission's discretion. The Price Broadcaster's, Inc. v. F.C.C., 111 U.S. App. D.C. 179, 295 F.2d 165 (1961); Interstate Broadcasting Company v. F.C.C., 105 U.S. App. D.C. 224, 265 F.2d 598 (1959).

The Review Board's selection of Elizabeth, New Jersey, over Matawan and Somerville, New Jersey, for its first broadcast facility will further this allocation goal by providing a first local broadcast facility, a first mouthpiece, to a community of 107,000 whose local needs in relation to the other proposed communities are overwhelmingly greater. From the standpoint of population alone Elizabeth dwarfs the other proposed communities; Elizabeth with its population of 107,000 is nearly ten times larger than Somerville, which has a population of 12,458, and twenty times as large as appellant's community of Matawan which has a population of 5,097 (A. 23).

As the examiner noted, the record indicates that Elizabeth is the third largest city in the United States and Puerto Rico not having a standard broadcast facility (A. 23).

Not only does Elizabeth's large population demonstrate its greater need for a first local outlet than the other applicants, but, in addition, it is a more industrialized city, prominent as a trading center, the seat of Union County (population 504,244), and one whose large population is made up of various substantial minority groups (A. 24-25, 81^{9/}). The record reflects and the examiner noted in his initial decision that Elizabeth outranks both Somerville and Matawan in total retail sales, amount of manufacturing, that there are more churches, banks, and schools in Elizabeth and that Elizabeth has larger police and fire department and hospital facilities (A. 24-25). This "overwhelmingly favorable" comparison dictated the Board's conclusion that Elizabeth had an inescapably greater need for a first local transmission service than either Matawan or Somerville (A. 25, 41).

9/ For example, the Mayor of Elizabeth testified that the community had substantial minority populations which created a need for a local outlet to transmit information regarding race relations and civil rights. There are approximately 30,000 people of Polish descent, 12,000--18,000 Negroes, and substantial numbers of Puerto Ricans and Cubans. The Mayor cited one example which graphically illustrates the need for a first local outlet for Elizabeth:

Unfortunately, out [sic] city has always been a hotbed of civil rights strive [sic] and there have been times during three summers when police reserves would have to be called upon to give aid to our local police department to quell disturbances.

I think a radio station in that instance would be most helpful (Tr. 1349).

In addition, a total of forty-seven civic, business, religious and political leaders of the Elizabeth community were interviewed and all expressed a need for a local radio station (A. 83-84, 106-110, 114). The examiner in summarizing their statements noted that they most frequently emphasized the need for coverage of municipal and county news, the need for coverage of school events, the need for informing citizens about such diversified matters as traffic, redevelopment and elections (A. 83-84).

While each community currently receives ten primary broadcast signals from nearby stations, the Board found that the programming of the existing stations is inadequate to meet the separate and distinct needs of Elizabeth in any significant manner (A. 115). The Board noted that Radio Elizabeth proposes to meet these needs by offering approximately 14 hours a week of local live programs and that its schedule will include discussion of community events, local news, sports, educational programs on behalf of Elizabeth's schools, and public affairs programs relating specifically to Elizabeth (A. 116-117). Thus the Review Board concluded that the public interest, convenience and necessity would best be served by a grant of Radio Elizabeth's application (A. 118).

Jupiter in challenging the Review Board's choice does not assert that the above findings are incorrect but, instead, asserts that the Review Board and the examiner failed to consider all the relevant evidence. The following discussion considers each

of appellant's evidentiary points and amply demonstrates the insubstantial nature of its contentions.^{10/}

A. The Review Board Properly Considered Jupiter's Principal Community As The Borough Of Matawan; Relevant Population Statistics Were Used.

The Review Board found that all of the communities here involved were served with at least ten reception services and therefore no preference could be given any applicant in this area. However, none of the communities had a local broadcast station and therefore the decisive comparative factor concerned the areas and populations to be served. The Review Board and the examiner found that a comparison of Elizabeth's population and service area with that of Matawan and Somerville was overwhelmingly favorable in all respects to Elizabeth.^{11/}

^{10/} We note that appellant's statement (Br. pp. 24-32) of the "fundamental concepts embodied in Section 307(b)" contains several general propositions which are incorrectly premised. On pages 25 and 26, for example, appellant alleges that Northwestern Ohio Broadcasting Corp., 3 Pike & Fischer, R.R. 1945 (1948), exhibits a recognition on the part of the Commission and Congress of the need to provide rural areas with service seemingly at the cost of heavily populated urban areas that have no local service. Neither Northwestern nor any other Commission opinion exhibits this policy. See Notice of Proposed Rule Making Regarding AM Station Assignment Standards, 25 Pike & Fischer, R.R. 1615 (1963). In Northwestern, the smaller community of Lima, Ohio, was awarded its second local facility over Columbus, Ohio, which already had five daytime and four nighttime services, all but one of which were local. In addition, Jupiter's characterization of what is a community for 307(b) purposes is also incorrect and we have discussed this point in Section A, infra. And finally we note that appellant's list of 307(b) criteria (Br. p. 30) is not a static list but varies with the scope of the issues designated for hearing.

^{11/} Matawan might also be referred to as Matawan Borough. New Jersey uses the term borough to refer to incorporated towns or villages. In addition, there is a Matawan Township which is not a governmental unit but merely a geographical portion of Monmouth County. Matawan Borough is also located in Monmouth County.

Jupiter attacks this conclusion by asserting that rulings by the examiner prevented it from adequately establishing the size and nature of its community for purposes of the 307(b) comparison. Jupiter (Br. pp. 32-33) maintains that it should have been permitted to introduce evidence as to the transmission needs (i.e., local outlet) of other boroughs and townships within its service area. This argument is premised on Jupiter's contention that the designated "community" for 307(b) purposes is really an amorphous but collective grouping of needs indigenous to various government units throughout its service area.

Neither the Commission's rules nor its decisions supports such a conclusion. In Kent-Ravenna Broadcasting Co., 22 Pike & Fischer, R.R. 605 (1961), where the Commission last undertook a full review of its 307(b) considerations,^{12/} the Commission made amply clear that an applicant must designate a principal community and that while it must make "a definitive showing of the entire area it proposes to serve," its transmission service (i.e., outlet for local expression) will be judged on the basis of its station location. 22 Pike & Fischer, R.R. at 612-613. Moreover, the Commission's rules establish that "each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision, or community which will be considered to be located in that place." 47 CFR §73.30 (a)(1). Should an applicant desire to serve more than

^{12/} Kent-Ravenna Broadcasting Co. is relied upon by the Commission in its 307(b) Policy Statement on Suburban Communities as being the best statement of the Commission's comparative 307(b) policies. 2 F.C.C. 2d 191.

one community it must then meet the requirements of §73.30(b)(1). In point of fact, when Jupiter originally applied for Matawan, it did make a dual proposal for the communities of Keyport and Matawan. Subsequent events led it to amend its application and designate Matawan alone as its community (See Br. p. 32).

Neither Mercer Broadcasting Co., 13 Pike & Fischer, R.R. 895 (1956), nor Times-Star Publishing Co., 4 Pike & Fischer, R.R. 718 (1949), relied upon by Jupiter lends any credence to its argument. In Mercer, the question arose as to whether an application could be filed for an unincorporated area which had no governmental unit. The Commission determined that an area's incorporation or non-incorporation was not decisive in consideration of whether a principal community existed for 307(b) purposes. However, Mercer does not mean that an applicant can designate one community (i.e. Matawan) and then ^{13/}enlarge such designation as it sees fit at a hearing. The portion

^{13/} Section 73.30 was clarified after the Mercer case to provide for unincorporated areas but the requirement that an application must be for a particular place remains. The order issued by the Commission when it added the word "community" to §73.30, 26 F.R. 9338, demonstrates that the "community" for which an applicant may apply must necessarily be a very particular place which must be specifically defined in the application. The order stated in pertinent part:

Where an application has been filed for a small community which is unincorporated and has no local government, uncertainty has arisen in the minds of some parties as to whether or not such a community comes within the provisions of the above rules. Parties have attempted to impose a limitation by arguing that the term "political subdivision" in the above rules somehow limits the Commission to the making of a grant to a station assigned to a location or place which has a political structure of its own, as well as the usual characteristics of an identifiable community.

In the individual cases concerned, the Commission has rejected this argument and has stated that the question of incorporation or non-incorporation is of no decisive import. Mercer Broadcasting Company, 13 RR 891, and most recently in Musical Heights, Inc., 19 RR 49 . . .

of Times-Star quoted at page 34 of appellant's brief is not supportive of Jupiter's theory. The quotation merely points out that Palo Alto served as a shopping center for a number of small cities in the area. This established the importance of the applicant's community as a commercial center. Appellant does not now contend nor did it before the Commission that such a showing was not allowed with regard to ^{14/} Matawan.

Directly on point and, significantly, ignored by appellant in its brief is Five Cities Broadcasting Co., Inc., 35 F.C.C. 501 (1963), where, when presented with the same argument, the Commission said:

Section 307(b) of the act requires the Commission to make a "fair, efficient, and equitable distribution of radio services" among the "several States and communities." Section 3.30(a) of the rules requires that a station serve a "particular city, town, political subdivision, or community." Five Cities could have chosen any one of several communities. However, it chose to apply for a station to serve Austell. Having made this choice, it cannot now contend that it proposes to serve a conglomerate of communities called "South Cobb." 35 F.C.C. 503

^{14/} Broadcasters, Inc., 16 Pike & Fischer, R.R. 295 (1957), does not as appellant claims (Br. p. 28) stand for the proposition that a "community" for 307(b) purposes is more than its designated community. In Broadcasters, Inc., the Commission in designating an application for hearing noted that because of the close proximity of two applicants, a choice on 307(b) grounds might not be possible; in that event, the qualifications of the parties rather than the communities would be compared to see which applicant would best serve not only its own community but its entire service area. Because of the closeness of two of the communities the Commission noted that conceivably this could be the decisive factor at the hearing. However, the opinion made perfectly clear that such a consideration was not relevant to a choice under 307(b).

In each instance cited by appellant the examiner's rejection of evidence went only to Jupiter's attempt to establish the transmission needs of other communities in Jupiter's service area as opposed to the needs of Matawan, the community designated in Jupiter's application. When evidence was offered that bore a relationship between Matawan and another community in its service area, the record reflects that it was accepted. (See Record Citations, Appellant's Br., pp. 11-13.) For example, appellant argues at length that the examiner rejected (Tr. 95, 97) evidence with regard to the special characteristics of Holmdel but nevertheless the record does reflect testimony as to that community's relationship to Matawan.^{15/} There is no question here but that the appellant was allowed to establish the relationship between Matawan and other communities in its service area. (See examiner's findings A. 7-11 on Matawan and its importance to the area.)^{16/} Moreover, the Review Board specifically noted in its decision that "[n]either Matawan nor Somerville is close to or readily accessible to a large city, and it therefore must be assumed that they are of importance to their adjacent areas" (A. 41).

15/ Albeit this relationship was found to be tenuous (Tr. 99):

Q. Mr. Poole, to which extent is Holmdel served by any of the service organizations in Matawan?

A. Well, in extreme emergencies there are consolidations of fire equipment and also on the western boundary of the municipality the Matawan boundary of the first squad comes into play. (Emphasis added.)

16/ Appellant's attorney pointed out: "Mr. Examiner, there is voluminous testimony in this proceeding as to the relationship between Matawan and Holmdel." (Tr. 96)

Jupiter also asserts (Br. p. 32) that its intent to provide program service to more than just Matawan indicates its intent to have its community be more than Matawan. While it is true that Jupiter had a general obligation to program for its whole service area, it is equally evident, as its application indicates, that its primary interest was Matawan. No other intent could be inferred.^{17/}

Furthermore, Jupiter's suggestion (Br. pp. 37-38) that it should have been allowed to present speculative population statistics in establishing the size of its community would appear to be no cause for reversal in light of the Review Board's decision. Jupiter's population in 1960 was 5,097. Jupiter claims (Br. p. 10,

^{17/} On August 29, 1961, the Commission received a notarized letter from Jupiter which indicates its city designation:

Dear Sir:

The application of Jupiter Associates, Inc. (File No. BP-14178) for a construction permit for a new standard broadcast station at Matawan-Keyport, New Jersey, is hereby amended to change the city designation from Matawan-Keyport, New Jersey to Matawan, New Jersey.

All other aspects of the applications, including the engineering data remains the same. It is respectfully submitted that this deletion of the dual-city designation in favor of specifying one of the two cities originally specified, is a minor amendment, which does not require that the application be assigned to a new file number.

Respectfully submitted,

JUPITER ASSOCIATES, INC.,
(R. 102)

Moreover, the record indicates that the needs which determined Jupiter's program proposals were mainly based on the first hand knowledge of Jupiter's Matawan stockholders (R. 105-107). And, in addition, all of appellant's technical proposals are presented for the Borough of Matawan (R. 143-149).

n. 11) that had it been given the opportunity it could have shown that new residences under construction would raise the population of Matawan to 6,500.^{18/} It is difficult to understand how Jupiter was prejudiced in not being able to make this showing since the Review Board's decision was premised on a population far exceeding either 5,097 or 6,500. The Review Board said:

The population of each of the latter two communities is less than 13,000, and the population of Elizabeth exceeds 107,000. Even assuming that the importance of Matawan and Somerville is greater than that reflected by their respective populations, the population of Elizabeth, as contrasted with that of Matawan and of Somerville, requires that it be preferred insofar as the need for a first local outlet for self-expression is concerned. (Emphasis added.) (A. 41)

In any event, the examiner considered other population statistics, such as for the respective counties and for the entire interference-free service areas, all of which demonstrated numerically the superior need of not just Elizabeth over Matawan but of Radio Elizabeth's entire service area over Jupiter's (A. 23-24).

B. The Review Board Correctly Determined That The Distance Of The Three Communities From Their Reception Services Did Not Warrant A Preference; Current Programming Of The Reception Services Indicates That No Preference For Matawan Was Warranted In This Regard.

Jupiter attacks the Review Board's finding that each of the applicant's communities had adequate reception of broadcast

18/ Jupiter readily admits (Br. p. 11, n. 11) that evidence was received for the purpose of showing growth.

service from stations in other communities. Appellant asserts that the distance from or accessibility of Matawan, as opposed to Elizabeth, to the source of their reception services (Br. pp. 40-47) as well as the difference in programming provided by these services (Br. pp. 47-52) should have been compared in making the 307(b) determination as to which community had the greatest need for its first local outlet. Without such a comparison it argues no valid 307(b) choice could be made.

Appellant contends that Matawan should have been accorded a comparative preference because of its distance from Newark and New York City. The Review Board answered this contention as follows:

. . . While weight has, in appropriate circumstances, been given to the distance of the stations which provide reception services to a community, significance has been attached to the factor of distance only where the stations providing such service are located at very substantial distances away. See Democrat Printing v. F.C.C., 202 F.2d 298, N. 10, 7 RR 2138 (1952); Eastside Broadcasting Co., FCC 64R-419, 3 RR 2d 505.

No such substantial distances are involved here. All of the communities with which we are concerned are in close proximity to the New York-New Jersey metropolitan complex.^{19/}

^{19/} Appellant has provided no current instance in which the Commission has given a preference in this regard to a community such as Matawan which is located no more than thirty miles from its nearest reception service. Moreover, appellant has not attempted to demonstrate real isolation aside from pure mileage statistics, a factor the Review Board and current decisions indicate warrants no weight. See Town and Country Radio, Inc., 28 F.C.C. 129, 148 (1960); Hawkeye Broadcasting, Inc., 34 F.C.C. 855 (1963). Times-Star Publishing Co., 4 Pike & Fischer, R.R. 718 (1949), relied on by appellant, while seemingly relevant is factually distinguishable in that it merely demonstrates that in 1949 thirty miles in the San Francisco area was a significant factor. But Times-Star does not in any way lend validity to appellant's argument that thirty miles in the Matawan area in 1968 amounts to a distance so substantial that a preference should have been given Matawan.

Next, appellant asserts (Br. 47-52) that the Review Board should have considered in deciding which community had the greater need for a local outlet how the programming needs of each community are currently being met by stations received in those communities. When Jupiter initially made this argument to the Review Board, it appeared to be no more than afterthought since, as the Review Board pointed out, no issue was designated with regard to the programming of the reception services and, indeed, none had been sought by Jupiter.^{20/} Nonetheless, the record establishes that there is no merit to Jupiter's contention that Matawan's programming needs were greater than Elizabeth's.

In a supplemental hearing, as appellant points out (Br. p. 48), the programming of both Matawan's and Elizabeth's reception services became relevant in determining whether Jupiter's and Radio Elizabeth's proposals were, despite their coverage of New York City and Newark, realistically designed for their designated communities.

^{20/} See Cookeville Broadcasting Co., 19 Pike & Fischer R.R. 897, 899 (1960) where the Commission pointed out that while evidence of programming of existing stations may be appropriate and had in the past been admitted under the standard 307(b) issue, it was determined upon further consideration "that the administrative process will be expedited, without prejudice to any of the parties, by permitting the adduction of such programming evidence only in a proceeding in which specific programming issues have been designated upon a threshold showing by one or more of the parties to the proceeding that such programming evidence may be of decisional significance. While it is clear that in some instances such programming evidence might be of decisional significance, it is equally clear that in other instances (e.g., where the communities involved are served by numerous existing stations), such evidence might not be of decisional significance." (Footnote omitted.)

On December 27, 1965, the Commission had ordered an additional hearing so that both Jupiter and Radio Elizabeth could rebut the newly established presumption (See Policy Statement on Section 307 (b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965) raised because they placed 5 mv/m signals over New York City and Newark. In order to meet their burden of rebutting this presumption, both parties had to establish un-met broadcasting needs in their community. As a result of this issue the Review Board discussed in its supplemental decision^{21/} Jupiter's earlier contention that Newark stations adequately programmed for Elizabeth:

The record evidence also demonstrates that the non-Newark stations which provide a 2 mv/m or greater signal to Elizabeth do not program for the specific needs and interests of Elizabeth. Rather, it must be concluded that they broadcast matters relating to Elizabeth only when such matters are considered of interest and significance to their entire service areas.*/ Similarly, the testimony of representatives

*/ The percentage of current local news these stations devote to local news of Elizabeth is minimal. The highest percentage was given by Station WNEW in New York City, whose representative stated ". . . although it is extremely difficult to approximate a percentage . . . the figure might approximate five percent."

21/ Jupiter disagrees (Br. pp. 54-55) with the Commission's consideration of the programming of the reception services in making its determination under the suburban policy issue as to whether a proposal is local in nature. Seemingly, it argues that programming and the proximity of reception services is correctly only a factor to be weighed in deciding which community should receive the applied for service. The short answer is that the Commission has determined that the programming of reception services may be of dual consideration: to determine whether a suburban application is local in nature or to determine which of the qualified local proposals has currently adequate reception services. Cf. Cookeville Broadcasting Co., 19 Pike & Fischer, R.R. 897 (1960) and Policy Statement on 307(b), 2 F.C.C. 2d 190 (1965).

of the three Newark stations providing primary daytime service to Elizabeth reveals that although these stations place a somewhat greater emphasis on Elizabeth (than the stations located elsewhere), their programming is inadequate in terms of meeting the separate and distinct needs and interests of that city in any significant manner (A. 115)

In sum, the record clearly establishes the invalidity of Jupiter's contentions. There is no indication that the Review Board was other than extremely fair in considering the relationship of Matawan to its reception services. Moreover, despite appellant's failure to seek, as required by Cookeville, designation of an issue with regard to the programming of Elizabeth's reception services, evidence was adduced in connection with the remand hearing which, although offered primarily for another purpose, reveals un-met programming needs in Elizabeth of a magnitude and complexity that is significantly greater than Matawan's needs.

C. The Technical Proposals Of The Applicants Were Used Solely To Determine Whether The Applicants Would Realistically Serve Their Designated Communities And Not To Determine Community Needs.

An additional error asserted by Jupiter (Br. pp. 52-53), one which even appellant describes as not "readily apparent", is that the technical proposals of the applicants were allegedly used for the purpose of selecting the community that had the greatest need. Jupiter's objection fails as it is premised on the false notion that the Review Board's finding that all three proposals were local in nature was a determinative factor in choosing which community under 307(b) had the greatest need for a local outlet.

A reading of the portions of the record cited by Jupiter (Br. p. 53) will clearly indicate the invalidity of this argument. In the Review Board's initial decision, because Radio Elizabeth's proposal would provide a strong signal to part of New York City and Newark, the traditional question arose as to whether its proposal was realistically for its designated community of Elizabeth. The Review Board after a lengthy discussion determined that Radio Elizabeth's proposal was intended to serve primarily Elizabeth. However, because of the new 307(b) Suburban Policy Statement both Jupiter's and Radio Elizabeth's proposals were remanded to the examiner by the Commission to redetermine whether their proposals were realistically local in nature and did not actually amount to applications for New York City or Newark. For the second time, but based on the issues designated under the new 307(b) presumption, the Review Board determined that each proposal was local in nature. Had this not been the case, neither community could have received consideration in making the 307(b) choice. See 2 F.C.C. 2d 190-194; Tidewater Broadcasting Co., 12 F.C.C. 2d 471 (1968); Monroeville Broadcasting Co., 12 F.C.C. 2d 359 (1968). It is a foregone conclusion in broadcast licensing that an applicant's proposal must qualify for the community it designates.

CONCLUSION

Thus, the record clearly establishes that Elizabeth, New Jersey, the third largest community in the United States without a

local broadcast facility, has needs of far greater magnitude than either Matawan, a community of 5,000, or Somerville, a community of approximately 12,000. The factual assertions made by Jupiter are insubstantial and raise no question which undermines the reasonableness of the Review Board's selection of Elizabeth for a grant. For these reasons the Review Board's decision should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D.C. 20554

December 6, 1968.

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,145

JUPITER ASSOCIATES, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

RADIO ELIZABETH, INC.

Intervenor

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF THE CASE

Although one of Jupiter's principal complaints has been that the findings of fact in the various decisions are woefully inadequate and at times erroneous, and that certain conclusions are not supported by the evidence, the Commission, in its counter-statement of the case, merely has repeated many of the findings and conclusions which are being questioned in this appeal. Under the circumstances, it is respectfully submitted that Jupiter's statement of the case is far more comprehensive and accurate.

ARGUMENT

I.

THE COMMISSION HAS FAILED TO RECOGNIZE THAT TWO SEPARATE AND DISTINCT PROBLEMS ARE PRESENTED BY JUPITER'S APPEAL AND ARGUMENTS, ONE RELATING TO JUPITER'S COMMUNITY AND THE OTHER RELATING TO THE AVAILABILITY OF TRANSMISSION SERVICE FOR ELIZABETH

This appeal presents two separate and distinct problems or questions involving the application of the definition of "transmission service."^{1/} One relates to the size and character of Jupiter's community for

1/ In Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955), which is cited by the Commission, the Court used the descriptive term "community radio mouthpiece." In discussing the meaning of "transmission service," Jupiter quoted, in footnote 6, page 8, and again on page 25, from the Commission's 1950 report and order, Origination Point of Programs of Broadcast Stations, Docket No. 8747, 1 Pike & Fischer RR 91:465, 91:466. In footnote 6, page 3, the Commission quotes from WSIX Broadcasting Station, 8 Pike & Fischer RR 216, 217 (1952). Actually, the quotations are from the same source, as the quotation from WSIX actually is a quotation of a quotation from Origination Point of Programs of Broadcast Stations.

2/
Section 307(b) purposes. The other relates to whether the Commission erred by not considering and recognizing (1) that the three Newark stations are so readily accessible from Elizabeth that they are capable of providing transmission service and not merely reception service for Elizabeth, and (2) that the three Newark stations have actually provided transmission service for Elizabeth.

3/
The authorities cited by the Commission relate primarily, if not entirely, to the first question, i.e., whether Jupiter's community, for Section 307(b) purposes, consists only of Matawan Borough as it existed in 1960 or is composed of other areas as well, either as they existed

2/ Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), which reads:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

3/ Kent-Ravenna Broadcasting Co., 22 Pike & Fischer RR 605 (1961); Section 73.30(a)(1) of the Commission's Rules, 47 C.F.R. § 73.30(a)(1); and Five Cities Broadcasting Co., Inc., 35 FCC 501 (1963).

in 1961 or at the time of the hearing.^{4/}

As is so often the case, the authorities cited by one party are subject to different interpretations and emphasis by the opposing parties, and other authorities almost always can be cited which appear to support a contrary position. For this reason, Jupiter will attempt a discussion of fundamental concepts and considerations with the hope that the questions and their answers appear less complex.

II.

THE COMMISSION'S ARGUMENTS ARE BASED UPON THE
ERRONEOUS PREMISE THAT A BROADCAST STATION MAY
NOT AND DOES NOT PROVIDE A TRANSMISSION SERVICE
FOR AREAS AND PERSONS LOCATED OUTSIDE THE
COMMUNITY TO WHICH THE STATION IS LICENSED

The Commission's brief clearly establishes that the key to this case lies in the answer to the following question:

^{4/} In footnote 10, page 9, the Commission erroneously states, without benefit of a citation, that Matawan Township is not "a governmental unit but merely a geographical portion of Monmouth County." The record contains numerous references to the Township. For example, Joseph Stenger testified that "The government of Matawan Township is conducted by five elected Committeemen who are elected by the Township residents. The Committee in turn elects one of its members to be Mayor." (Jupiter Ex. 20, Pl, L2-4).

May a broadcast station provide a transmission service for areas and persons located outside the geographic boundaries of the community to which the station is licensed?

If the answer to this question is "Yes," the Commission's decision must be reversed. If the answer is "No," the decision must be affirmed.

In support of its premise that a broadcast station may not and does not provide a transmission service for areas and persons outside the geographic boundaries of the community to which it is licensed, the Commission cites Section 73.30(a)(1) of its Rules. That section does provide, as noted by the Commission on page 10 of its brief, that "each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision, or community which will be specified in the station license and the station will be considered to be located in such place." However, the Commission not only gave no consideration to the word "primarily," but also failed to note that Section 73.30(a)(1) further provides that "the main studio may be located at the transmitter site whether or not the transmitter site is in the place where the station is located." The latter becomes significant

when consideration is given to the definition of the term "transmission service" which is dependent upon "a reasonably accessible studio for the origination of local programs."^{5/}

Further, if the words "will be licensed to serve primarily a particular city, town, political subdivision, or community" of Section 73.30(a)(1) are strictly construed as urged by the Commission, the rule is at variance with the definition of a Class II station^{6/} given in Section 73.21(a)(2) of its Rules, 47 C.F.R. § 73.21(a)(2):

A Class II station is a secondary station which operates on a clear channel (see § 73.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations.

The point which Jupiter desires to make may be illustrated by two examples here in the Washington, D.C., area. Station WWDC, which is licensed to Washington, maintains

^{5/} The complete quotation of the definition given in Origination Point of Programs of Broadcast Stations is given on page 25 of Jupiter's brief.

^{6/} As noted by the Commission on page 2 of its brief, each of the applicants is for a Class II station.

its main studios at its transmitter in Montgomery County, Maryland, near Wheaton and some distance from the nearest boundary of Washington. However, under Section 73.30(a)(1) of the Rules, its studios are as "reasonably accessible" to Washington as though they were located in the heart of the city. But are not its studios "reasonably accessible" to residents of some portions of Montgomery County? And cannot those studios provide such "reasonably accessible" studios that transmission service may be provided to areas and persons outside the geographic boundaries of Washington? The answer is obvious, "Yes."

That a station may provide a transmission service for areas and populations outside the geographic boundaries of the community to which it is licensed is further illustrated by a recent case involving another station in the Washington area. For many years, Station WUST was licensed as a Bethesda, Maryland, station. In various orders issued in connection with an application to increase the power of WUST, the Commission noted that, although the station was licensed to Bethesda, the station had been operated to serve the Washington, D.C., Negro population and actually has provided a transmission facility for Washington rather than

for Bethesda. Atlantic Broadcasting Co., 5 FCC 2d 548, 552, 8 Pike & Fischer RR 2d 906, 908 (1966).

If Station WUST was permitted to provide a transmission service for areas and persons outside the geographic boundaries of Bethesda, may not Jupiter provide a transmission service for the areas and persons immediately contiguous to the 2.5 square mile Borough of Matawan? If Jupiter may provide transmission service outside the Borough of Matawan, may it not offer evidence to establish the areas and persons for which it intends to provide a transmission service? And does not the total area and population for which Jupiter plans to provide a transmission service become Jupiter's community for Section 307(b) purposes?

But the Commission argues that consideration of any areas outside the geographic boundaries of Matawan Borough cannot be considered, citing Five Cities Broadcasting Co., Inc., 35 FCC 501, 1 Pike & Fischer RR 2d 279 (1963). As is so often the case, the facts there were far different than here. There, according to footnote 4, "The area contended for by Five Cities as the 'South Cobb' area is the 'southern half of Cobb County with the exception of the city of Smyrna.'" Here, Jupiter only argues that its

community is made up of contiguous areas with a wide variety of common interests and services. If Five Cities contributes anything, it supports Jupiter.

Five Cities does provide some support for Jupiter by its discussion of Seven Locks Broadcasting Co., 22 Pike & Fischer RR 967 (1962). The Commission stated as follows:

Moreover, the Commission made it clear in Seven Locks Broadcasting Co., 22 R.R. 967 (1962), that to qualify as a "city, town, political subdivision, or community" a place of station location must be an identifiable population grouping separate and apart from all others and that it must not enclose within its geographic boundaries areas or populations more logically identified as or associated with some other location.

When a single name, Matawan, is given to both the Borough and the Township, when a single name is used by the residents of the area without distinguishing between the Borough and the Township, when many municipal services such as the schools and the library are common to both the Borough and the Township, Jupiter's asserted community meets each and every standard and test set forth in both Five Cities and

7/8/

Seven Locks.

Even Kent-Ravenna Broadcasting Co., 22 Pike & Fischer RR 605 (1961), relied upon by the Commission, fully supports Jupiter's argument that the Hearing Examiner should have at least received evidence concerning the areas around Matawan Borough before concluding that Jupiter's community is only the Borough. There, the Commission held as follows (at 612):

11. We wish to emphasize that those equitable and efficient factors relevant to any particular proceeding can be determined only with regard to the particular facts of the case, and they

7/ The description of Matawan -- Jupiter's community -- on pages 9 to 13, inclusive, of Jupiter's brief is particularly significant. In addition, the application merely gave "Matawan" as the location of the proposed station without distinguishing between the Borough and the Township. As noted on page 39 of Jupiter's brief, the basis for the conclusion that Jupiter's community is the Borough rather than the Township is not contained in any of the decisions and orders. The application is not part of the evidentiary record of the hearing.

8/ Even the Commission in its brief fails to distinguish between the Borough and the Township! For example, the discussion on page 14 and footnote 17 refers only to Matawan. Is it little wonder that Jupiter contends that limiting its community to only Matawan Borough was arbitrary and capricious?

must be weighed and balanced to reach an ultimate conclusion as to which applications would best serve the public interest, convenience, and necessity. In such cases as are designated for hearing it will be necessary for the Hearing Examiner to determine, under the designated 307(b) issue, the necessity for inquiry into any particular facet of this problem as it relates to the circumstances before him and to what extent any proffered evidence is desirable or necessary. When considering the multiple and complex questions involved with regard to mutually exclusive applicants, whether for the same or different communities, only in those situations in which, after the balancing of all those factors necessary in any particular case, neither proposal can be awarded a significant preference under Section 307(b), will the Commission look to the standard comparative issue to make a choice between the proposals.

The Commission's authorities simply do not answer Jupiter's arguments that it was deprived of its right to present evidence to establish the composition and characteristics of its community. Contrary to the Commission's assertions, the decision in Mercer Broadcasting Company, 13 Pike & Fischer RR 895 (1956), does provide some significant guidance even though the community, as in Seven^{9/}Locks, was unincorporated.

^{9/} The Commission's comments on Times-Star Publishing Co., 4 Pike & Fischer RR 718, 725 (1949), a case relied upon by Jupiter, will be discussed later in this reply brief.

The same principles are equally applicable to Jupiter's argument that the three existing Newark stations must be considered as providing some transmission service for Elizabeth and that the Section 307(b) comparison between the communities must give full force and effect to those facts. The Commission's argument, if it has made it, that the Newark stations provide transmission service only to Newark, simply is not supported by any authorities or any logical consideration and application of the basic principles of Section 307(b).

Thus, it is apparent that the key to this case lies in the question of whether a broadcast station may provide a transmission service for areas and persons outside the geographic boundaries of the community to which the station is licensed. Every one of the authorities, including those relied upon by the Commission, answer that question in the affirmative. The fatal weakness in the Commission's case, both at the Commission level and now before this Court, is the premise that a broadcast station may not and does not provide a transmission service for areas and populations outside the geographic boundaries of the community to which the station is licensed.

III.

EVIDENCE OFFERED TO SHOW GROWTH OF BOTH MATAWAN
BOROUGH AND MATAWAN TOWNSHIP DURING THE PERIOD
BETWEEN THE 1960 CENSUS AND THE TIME OF THE
HEARING WAS NOT SPECULATIVE AS CONTENDED BY
THE COMMISSION

One of the prejudicial errors asserted by Jupiter was the Examiner's rejection of evidence offered to show that residential construction in Matawan Borough and Matawan Township had been so great since the 1960 Census that the Census figures were hopelessly out of date. As noted on page 37 of Jupiter's brief, the Examiner sustained an objection to such evidence, stating as follows: "Well, I would like to make it clear that I am not going to take anything but the 1960 Census." (A. 135).

One of the comments of the Examiner in 1963 was that ". . . I am not going to speculate on what is going to be happening up through 1964". (A. 136) (Emphasis supplied).

The Commission's answer to Jupiter's argument that up-to-date evidence should have been received is contained on pages 14 and 15 of its brief. First, it says that Jupiter desired to "present speculative population statistics." Second, it says that even the evidence of "new residences under construction would raise the population of Matawan

to 6,500."

The answers are simple. First, the evidence Jupiter was precluded from offering was not "speculative" but was based upon probative evidence. That a certain number of homes have been constructed and occupied by families is not speculative. Second, the rejected evidence, if fully developed and considered in its entirety, would have established the following most significant facts summarized on page 38 of Jupiter's brief:

In spite of the Examiner's ruling, some evidence of population growth was received. However, it was completely ignored in all four decisions. The uncontradicted evidence is summarized in footnote 11, above, and proves that the combined population of Matawan Borough and Matawan Township had increased from 12,456 in 1960 to more than 21,000 by the middle of 1963. If only 1960 Census figures for Keyport are considered, the population of Matawan Borough, Matawan Township, and Keyport exceeded 27,500 by the middle of 1963. Such totals are far different from the 5,097 population assumed by the Examiner and the Review Board when comparing the communities of Jupiter and Radio Elizabeth. The prejudice to Jupiter is obvious.

Then Jupiter argued as follows:

It has been five and a half years since the hearing at which any population evidence was presented. It is inconceivable that new

home construction in the Matawan area ceased with the hearing in 1963. It is respectfully submitted that the Court should remand this case with instructions to the Commission to have the record brought up-to-date to reflect present day conditions.

IV.

THE COMMISSION'S ANSWER TO JUPITER'S ARGUMENT THAT THE DISTANCE AND RELATIONSHIP OF MATAWAN AND ELIZABETH TO NEW YORK CITY AND NEWARK SHOULD HAVE BEEN CONSIDERED UNDER THE SECTION 307(b) ISSUE IS LESS THAN PERSUASIVE

Jupiter argued, on pages 40 to 44, inclusive, of its brief (1) that the findings of fact in the decisions concerning the distances between Matawan and Elizabeth to New York City and Newark were so erroneous as to be arbitrary and capricious, (2) that exceptions requesting accurate and complete findings were "Denied as not of decisional significance," and (3) that, had all relevant and material facts been considered, a most significant preference would have been awarded to Jupiter.

The Commission, in its brief, has studiously avoided any comment upon Jupiter's contention and showing of prejudicial errors and omissions from the findings of fact. Its silence may reasonably be construed as a concession

that Jupiter's argument is well founded. Instead, the Commission argues, on page 16 of its brief, that "no substantial distances are involved here," and that the Review Board had held as follows:

. . . While weight has, in appropriate circumstances, been given to the distance of the stations which provide reception services to a community, significance has been attached to the factor of distance only where the stations providing such service are located at very substantial distances away. See Democrat Printing v. F.C.C., 202 F.2d 298, N. 10, 7 RR 2138 (1952); Eastside Broadcasting Co., FCC 64R-419, 3 RR 2d 505.

In footnote 19, page 16, the Commission also cites Town and Country Radio, Inc., 28 FCC 129, 148, 15 Pike & Fischer RR 1035 (1960), and Hawkeye Broadcasting, Inc., 34 FCC 855, 24 Pike & Fischer RR 558 (1963), and also discusses Times-Star Publishing Co., 4 Pike & Fischer RR 718 (1949), which is relied upon heavily by Jupiter.

The first weakness in the Commission's argument is the statement that "No substantial distances are involved here." How can such a statement be made when the Commission has refused to make full, complete, and accurate findings of fact as to the distances involved? Is not a distance

of 45 miles, the land distance between Matawan and New York City's Manhattan Island, a substantial distance, particularly when compared to but 14 miles between Elizabeth and the same point in New York City? Is not a distance of 35 miles, the land distance between Matawan and Newark, a substantial distance, particularly when compared to the 3 miles separating the centers of Elizabeth and Newark? To hold that the distances are not substantial would be arbitrary and capricious.

The second weakness in the Commission's argument is that it has erroneously assumed that Jupiter's arguments concerning distances are limited solely to the sources of reception services. When Jupiter argues that no stations are readily accessible from Matawan and three stations in Newark are readily accessible from Elizabeth, Jupiter is referring primarily to the availability or non-availability of transmission services.

The third weakness in the Commission's argument is that not one of the authorities relied upon by the Commission has even a remote relationship to the question and argument presented here. Jupiter's contention is that the relationship of and distance from the two communities,

Matawan and Elizabeth, to New York City and Newark, where stations are located which provide primary service to Matawan and Elizabeth, must be considered and compared under the Section 307(b) issue. Each of the four cases relied upon by the Commission, Democrat Printing, Eastside, Town and Country, and Hawkeye, involved only a single application whose proposed operation would cause objectionable interference to an existing station. No Section 307(b) comparison was required or possible. It is significant that the Commission, both in the proceeding before it and also in this appeal, has found it necessary to rely upon such unrelated authorities.

In footnote 19, page 16, the Commission argues that "Appellant has provided no current instance in which the Commission has given a preference in this regard to a community such as Matawan which is located no more than thirty miles from its nearest reception service." Speidel Broadcasting Corp. of Ohio, 35 FCC 74, 25 Pike & Fischer RR 723 (1963), Monroeville Broadcasting Company, 35 FCC 657, 1 Pike & Fischer RR 2d 607 (1963), and Radio Haddonfield, Inc., 37 FCC 168, 3 Pike & Fischer RR 2d 25 (1964), are recent instances in

which the Commission has given preference in this regard to a community located "no more than thirty miles from its nearest reception service." Each case is cited in Jupiter's brief. Once again, the Commission is grossly in error.

Also in footnote 19, page 16, the Commission states that "Moreover, appellant has not attempted to demonstrate real isolation aside from pure mileage statistics, a factor the Review Board and current decisions indicate warrants no weight." One example of such evidence offered by Jupiter is the replies of the stations which provide primary service to Matawan to Jupiter's written interrogatories which were received in evidence at the remand or second hearing (Jupiter Ex. 37, 38, 39, 40, 41, 42, 43, 44, 45, 48). Another example of such evidence is contained in the testimony of officials of the various stations which provide primary service to Elizabeth and Matawan (Radio Elizabeth Ex. 300-1 to 300-18, inclusive). But "real isolation" need not be shown because the transmission service contemplated by Section 307(b) of the Act is a readily accessible station. Surely, 35 miles from Matawan to the nearest station which provides a listenable signal to that community is far more "isolation" than the 3 miles from Elizabeth to the nearest station, which is in Newark.

Even the attempt to downgrade Times-Star Publishing Co., supra, upon which Jupiter has relied, further establishes the lack of substance in the Commission's arguments. On page

12 of its brief, the Commission argues that the quotation from Times-Star on page 34 of Jupiter's brief "merely points out that Palo Alto served as a shopping center for a number of small cities in the area," and that "This established the importance of the applicant's community as a commercial center." What the Commission conveniently overlooks is that not one of the decisions in this case contain any similar findings even though there is a limited amount of evidence in the record concerning the areas surrounding the Borough and the Township of Matawan. Jupiter's request for more complete findings of fact were "Denied as not of decisional significance."

In footnote 19, page 16, the following argument concerning Times-Star vividly illustrates the lack of substance in the Commission's arguments:

Times-Star Publishing Co., 4 Fike & Fischer, R.R. 718 (1949), relied upon by appellant, while seemingly relevant is factually distinguishable in that it merely demonstrates that in 1949 thirty miles in the San Francisco area was a significant factor. But Times-Star does not in any way lend validity to appellant's argument that thirty miles in the Matawan area in 1968 amounts to a distance so substantial that a preference should have been given Matawan.

The important lesson from Times-Star is that, where there are two mutually exclusive applications for the first station in two separate, distinct, and somewhat widely separated

communities (there Alameda and Palo Alto, here Elizabeth and Matawan), the distances of the two specified communities from cities in which stations are located which provide primary service to the specified communities should be considered and compared in making a choice of a community under the Section 307(b) issue.

The fact that the Times-Star decision was issued in 1949, almost 20 years ago, does not detract from its significance as argued by the Commission. Actually, the fact that Times-Star has stood the test of time without once being overruled or modified is most persuasive. The following from the Times-Star decision, set forth on page 29 of Jupiter's brief, is so significant that it bears repeating:

Although the population of Alameda is approximately twice the size of Palo Alto and the principal cities surrounding it, Alameda is, because of its contiguous location to Oakland, a more integral part of the San Francisco-Oakland area than is Palo Alto, which is located approximately thirty miles from San Francisco and from Oakland. For this reason, the San Francisco and Oakland standard broadcast facilities are, for all practical purposes, unavailable to the residents of Palo Alto and its surrounding communities. By contrast, the contiguous location of Alameda to Oakland not only affords the residents of Alameda the use of the three standard broadcast facilities at Oakland but, in addition,

San Francisco is located approximately ten miles from Alameda and, thus, the San Francisco standard broadcast facilities are more accessible to the residents of Alameda than to the residents of Palo Alto. The Commission, therefore, believes that it would not be in the public interest to authorize a station to Alameda, which has the availability of three standard broadcast stations located contiguous to that city and to deny the Palo Alto application, when Palo Alto and its surrounding communities, at most, have access to one San Mateo broadcast station, located approximately twenty miles from Palo Alto, which has recently established a Palo Alto auxiliary studio. (Emphasis supplied)

V.

THE FACT THAT THE NEWARK STATIONS DO NOT NOW SATISFY ALL OF THE NEEDS OF ELIZABETH FOR RADIO SERVICE DOES NOT EXCUSE THE FAILURE TO MAKE COMPLETE FINDINGS OF FACT CONCERNING THE SERVICE ACTUALLY RENDERED AND THE CONSIDERATION OF SUCH EVIDENCE AND FINDINGS UNDER THE SECTION 307(b) ISSUE

At the outset, it must be kept in mind that Section 307(b) of the Act requires a determination and comparison of the needs of separate and distinct communities specified in mutually exclusive applications before the qualifications and proposals of the applicants may be compared. FCC v. Allentown Broadcasting Corp., supra. One such area of comparison is a comparison of the service actually rendered for and on behalf of the communities by existing stations.

On pages 49 and 50 of its brief, Jupiter notes that the evidence shows virtually no service for Matawan and some service for Elizabeth. The importance of such evidence is that it shows whether the existing stations are sufficiently accessible to be capable of fulfilling at least some of the needs of the two communities.

The Commission has completely ignored, once again, Jupiter's argument that the findings of fact concerning the service provided Elizabeth by the Newark stations do not fully and accurately reflect the evidence of record. The Commission also has ignored Jupiter's argument that the service available to the communities must be compared under the Section 307(b) issue. Instead, it has quoted from the Review Board's decision that the programming of the three Newark stations "is inadequate in terms of meeting the separate and distinct needs" of Elizabeth.

The simple, inescapable fact is that some of the needs of Elizabeth already are being served by existing stations while, by comparison, the only need of Matawan served by any existing station is the broadcast of school closings during the severe winter months. Even the most superficial comparison would have been favorable to Jupiter. It is

respectfully submitted that the Commission has not adequately answered Jupiter's showing that a comparison is required by Section 307(b).

VI.

THE COMMISSION DOES NOT HAVE SUCH WIDE LATITUDE
THAT IT MAY ACT IN AN ARBITRARY AND CAPRICIOUS
MANNER

At the outset of its argument, on page 6, the Commission notes that implementation of Section 307(b) of the Act "has long been held to be a matter solely within the Commission's discretion." In support, the Commission cited The Price Broadcasters, Inc. v. Federal Communications Commission, 111 U.S. App. D.C. 179, 295 F. 2d 165 (1961), and Interstate Broadcasting Company v. Federal Communications Commission, 105 U.S. App. D.C. 224, 265 F. 2d 598 (1959).

While the general principal exists that the Congress has entrusted the administration of the Communications Act and related policies to the Federal Communications Commission, FCC v. Allentown, supra, makes it crystal clear that the Commission must operate within well defined guidelines and that arbitrary and capricious actions will be set aside by the courts. Thus, the Commission cannot hide behind those

decisions when the legality of its actions is questioned. Without a doubt, this is a case which requires judicial action.

VII.

THE ULTIMATE QUESTION IS: HOW MAY THE FIRST
READILY ACCESSIBLE BROADCAST STATION BE MADE
AVAILABLE TO PERSONS RESIDING IN SMALL
COMMUNITIES THROUGHOUT THE UNITED STATES

Congress intended that at least one readily accessible broadcast station be made available to every community and every person within the United States insofar as possible. That objective has been so well recognized and so frequently stated in policy pronouncements of the Commission over a period of many years that citation of authorities is unnecessary. As stated in Northwestern Broadcasting Corp., 3 Pike & Fischer R.R. 1945, 1954 (1948), if the size of a community is the only factor to be considered, "an undue concentration of facilities in the larger communities will inevitably result."

In arguing that the need of Elizabeth for its first station is greater than the need of Matawan for its first station, the Commission relied entirely upon a comparison of the size of the communities. On page 6 of its brief, the Commission states:

From the standpoint of population alone Elizabeth dwarfs the other proposed communities; Elizabeth with its population of 107,000 is nearly ten times larger than Somerville, which has a population of

12,458, and twenty times as large as appellant's community of Matawan which has a population of 5,097 (R.).^{10/}

Not once in four separate decisions, and not once in its brief, has the Commission stated that the closest station providing a listenable signal is 3 miles from Elizabeth and 35 miles from Matawan. In fact, the Review Board denied an exception to the failure to give consideration to those facts as "Denied as not of decisional significance."

The more than 25,000 persons living in a radius of less than 2 miles in the Matawan area have been relegated to the status of second class citizens.

Unless consideration is given to factors other than population within the geographic boundary of an incorporated community, how may the objectives of Congress be achieved?

Although this Court may not grant Jupiter's application, it most certainly can remand this case to the Commission with instructions that the accessibility of existing stations to Elizabeth and Matawan be considered and a new decision prepared.

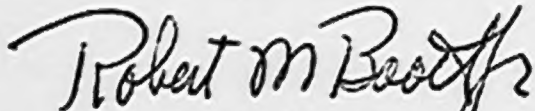
^{10/} Obviously, the volume of retail sales and other indices of economic activity, the number of schools, and the number of churches vary directly with population. To base a preference upon such considerations as well as upon population is to give enhanced value to population.

VIII.

CONCLUSIONS

Almost every argument advanced by Jupiter has been unanswered by the Commission. Not even the authorities cited by the Commission support its arguments. Most of the questions listed on page 31 of Jupiter's brief remain unanswered. For the reasons stated herein and in Jupiter's brief, it is respectfully submitted that the Decision of the Federal Communications Commission granting the application of Radio Elizabeth, Inc. for a new station at Elizabeth, New Jersey, denying the mutually exclusive application of Jupiter Associates, Inc. for a new station at Matawan, New Jersey, should be reversed and remanded to the Commission for further consideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Robert M. Booth, Jr., hereby certify that the foregoing Reply Brief of Appellant was mailed this 21st day of December, 1968, to the following:

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